COMMENTARIES

ON THE

Laws of England.

BOOK THE SECOND.

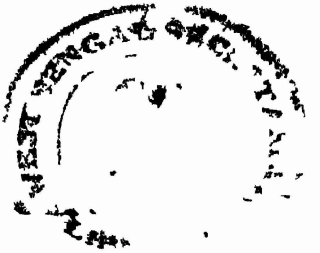
BY

SIR WILLIAM BLACKSTONE, KNT.
ONE OF THE JUSTICES OF HIS MAJESTY'S
COURT OF COMMON PLEAS.

THE SIXTEENTH EDITION,
WITH THE LAST CORRECTIONS OF THE AUTHOR;
AND WITH NOTES
BY JOHN TAYLOR COLERIDGE, ESQ.
OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

LONDON:
PRINTED BY A. STRAHAN,
LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;
FOR T. CADELL IN THE STRAND;
AND J. BUTTERWORTH AND SON, FLEET-STREET.
1825.

346
B631



708

CONTENTS.

BOOK II.

Of the RIGHTS *of* THINGS.

CHAP. I.

Page

Of PROPERTY *in general* 1

CHAP. II.

Of REAL PROPERTY; *and first, of* CORPOREAL HEREDITAMENTS..... 16

CHAP. III.

Of INCORPOREAL HEREDITAMENTS 20

CHAP. IV.

Of the FEODAL SYSTEM 44

CHAP. V.

Of the antient ENGLISH TENURES 59

CHAP. VI.

Of the modern ENGLISH TENURES 78

CHAP. VII.

Page

Of FREEHOLD ESTATES, *of* INHERITANCE 103

CHAP. VIII.

Of FREEHOLDS, *not of* INHERITANCE 120

CHAP. IX.

Of ESTATES LESS *than* FREEHOLD 140

CHAP. X.

Of ESTATES *upon* CONDITION 152

CHAP. XI.

Of ESTATES *in* POSSESSION, REMAINDER, *and* REVERSION 163

CHAP. XII.

Of ESTATES *in* SEVERALTY, JOINT-TENANCY, COPARCENARY, *and* COMMON 179

CHAP. XIII.

Of the TITLE *to* THINGS REAL, *in general* 195

CHAP. XIV.

Of TITLE *by* DESCENT 200

CHAP. XV.

Of TITLE *by* PURCHASE; *and, first, by* ESCHEAT 241

CHAP. XVI.

Page
Of TITLE *by* OCCUPANCY 258

CHAP. XVII.

Of TITLE *by* PRESCRIPTION 263

CHAP. XVIII.

Of TITLE *by* FORFEITURE 267

CHAP. XIX.

Of TITLE *by* ALIENATION 287

CHAP. XX.

Of ALIENATION *by* DEED 295

CHAP. XXI.

Of ALIENATION *by matter of* RECORD 344

CHAP. XXII.

Of ALIENATION *by* SPECIAL CUSTOM 365

CHAP. XXIII.

ALIENATION *by* DEVISE 373

CHAP. XXIV.

Of THINGS PERSONAL 384

CHAP. XXV.

Of PROPERTY *in* THINGS PERSONAL 389

CHAP. XXVI.

Page
Of TITLE *to* THINGS PERSONAL, *by* OCCUPANCY 400

CHAP. XXVII.

Of TITLE *by* PREROGATIVE *and* FORFEITURE 408

CHAP. XXVIII.

Of TITLE *by* CUSTOM 422

CHAP. XXIX.

Of TITLE *by* SUCCESSION, MARRIAGE, *and* JUDGMENT ... 430

CHAP. XXX.

Of TITLE *by* GIFT, GRANT, *and* CONTRACT 440

CHAP. XXXI.

Of TITLE *by* BANKRUPTCY 471

CHAP. XXXII.

Of TITLE *by* TESTAMENT, *and* ADMINISTRATION 489

APPENDIX.

Page

N° I. *Vetus Carta* FEOFFAMENTI i

N° II. *A modern Conveyance by* LEASE *and* RELEASE.

§ 1. LEASE, *or* BARGAIN *and* SALE *for a Year* ... ii
§ 2. *Deed of* RELEASE iii

N° III. *An* OBLIGATION, *or* BOND *with* CONDITION *for the Payment of Money* xiii

N° IV. *A* FINE *of* LANDS sur Cognizance de Droit, come ceo, *&c.*

§ 1. *Writ of Covenant, or* PRAECIPE xiv
§ 2. *The Licence to agree* ..... ibid.
§ 3. *The Concord* ..... ibid.
§ 4. *The Note, or Abstract* xv
§ 5. *The Foot Chirograph, or Indenture of the* FINE. ibid.
§ 6. *Proclamations endorsed upon the* FINE, *according to the Statutes* xvi

N° V. *A common* RECOVERY *of Lands, with double Voucher.*

§ 1. *Writ of Entry* sur Disseisin *in the* Post; or PRAECIPE xvii
§ 2. *Exemplification of the* RECOVERY *Roll* ..... ibid.

COMMENTARIES

ON THE

LAWS OF ENGLAND.

BENGAL SECRETARIAT LIBRARY.

BOOK THE SECOND.

OF THE RIGHTS OF THINGS.

CHAPTER THE FIRST.

OF PROPERTY IN GENERAL.

THE former Book of these Commentaries having treated at large of the *jura personarum*, or such rights and duties as are annexed to the persons of men, the objects of our inquiry in this second book will be the *jura rerum*, or those rights which a man may acquire in and to such external things as are unconnected with his person. These are what the writers on natural law style the rights of dominion, or property, concerning the nature and original of which I shall first premise a few observations, before I proceed to distribute and consider it's several objects.

THERE is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. And yet there are very few, that will give them- [2]

selves the trouble to consider the original and foundation of this right. Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title; or at best, we rest satisfied with the decision of the laws in our favour, without examining the reason or authority upon which those laws have been built. We think it enough that our title is derived by the grant of the former proprietor, by descent from our ancestors, or by the last will and testament of the dying owner; not caring to reflect that (accurately and strictly speaking) there is no foundation in nature, or in natural law, why a set of words upon parchment should convey the dominion of land; why the son should have a right to exclude his fellow-creatures from a determinate spot of ground, because his father had done so before him: or why the occupier of a particular field, or of a jewel, when lying on his death-bed, and no longer able to maintain possession, should be entitled to tell the rest of the world which of them should enjoy it after him. These inquiries, it must be owned, would be useless and even troublesome in common life. It is well if the mass of mankind will obey the laws when made, without scrutinising too nicely into the reasons of making them. But, when law is to be considered not only as matter of practice, but also as a rational science, it cannot be improper or useless to examine more deeply the rudiments and grounds of these positive constitutions of society.

In the beginning of the world, we are informed by holy writ, the all-bountiful Creator gave to man "dominion over "all the earth; and over the fish of the sea, and over the "fowl of the air, and over every living thing that moveth [3] "upon the earth[a]." This is the only true and solid foundation of man's dominion over external things, whatever airy metaphysical notions may have been started by fanciful writers upon this subject. The earth, therefore, and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the Creator. And, while the earth continued bare of its inhabitants, it is reasonable to suppose that all was in common among them, and

[a] Gen. i. 28.

that every one took from the public stock to his own use such things as his immediate necessities required.

THESE general notions of property were then sufficient to answer all the purposes of human life; and might perhaps still have answered them had it been possible for mankind to have remained in a state of primeval simplicity: as may be collected from the manners of many American nations when first discovered by the Europeans; and from the antient method of living among the first Europeans themselves, if we may credit either the memorials of them preserved in the golden age of the poets, or the uniform accounts given by historians of those times, wherein "*erant omnia communia et* "*indivisa omnibus, veluti unum cunctis patrimonium esset*[b]." Not that this communion of goods seems ever to have been applicable, even in the earliest stages, to ought but the *substance* of the thing; nor could it be extended to the *use* of it. For, by the law of nature and reason, he, who first began to use it, acquired therein a kind of transient property, that lasted so long as he was using it, and no longer[c]: or, to speak with greater precision, the *right* of possession continued for the same time only that the *act* of possession lasted. Thus the ground was in common, and no part of it was the permanent property of any man in particular; yet whoever was in the occupation of any determined spot of it, for rest, for shade, or the like, acquired for the time a sort of ownership, from which it would have been unjust, and contrary to the law of nature, to have driven him by force: but the instant that he quitted the use or occupation of it, another might seize it, [4] without injustice. Thus also a vine or other tree might be said to be in common, as all men were equally entitled to it's produce; and yet any private individual might gain the sole property of the fruit, which he had gathered for his own repast. A doctrine well illustrated by Cicero, who compares the world to a great theatre, which is common to the public, and yet the place which any man has taken is for the time his own[d].

[b] Justin. l. 43. c. 1.

[c] Barbeyr. Puff. l. 4. c. 4.

[d] *Quemadmodum theatrum, cum commune sit, recte tamen dici potest, ejus esse eum locum quem quisque occupârit. De Fin. l. 3. c. 20.*

But when mankind increased in number, craft, and ambition, it became necessary to entertain conceptions of more permanent dominion; and to appropriate to individuals not the immediate *use* only, but the very *substance* of the thing to be used. Otherwise innumerable tumults must have arisen, and the good order of the world been continually broken and disturbed, while a variety of persons were striving who should get the first occupation of the same thing, or disputing which of them had actually gained it. As human life also grew more and more refined, abundance of conveniences were devised to render it more easy, commodious, and agreeable; as, habitations for shelter and safety, and raiment for warmth and decency. But no man would be at the trouble to provide either, so long as he had only an usufructuary property in them, which was to cease the instant that he quitted possession; — if, as soon as he walked out of his tent, or pulled off his garment, the next stranger who came by would have a right to inhabit the one, and to wear the other. In the case of habitations in particular, it was natural to observe, that even the brute creation, to whom every thing else was in common, maintained a kind of permanent property in their dwellings, especially for the protection of their young; that the birds of the air had nests, and the beasts of the field had caverns, the invasion of which they esteemed a very flagrant injustice, and would sacrifice their lives to preserve them. Hence a property was soon established in every man's house and home-stall; which seem to have been originally mere
[5] temporary huts or moveable cabins, suited to the design of Providence for more speedily peopling the earth, and suited to the wandering life of their owners, before any extensive property in the soil or ground was established. And there can be no doubt, but that moveables of every kind became sooner appropriated than the permanent substantial soil: partly because they were more susceptible of a long occupancy, which might be continued for months together without any sensible interruption, and at length, by usage, ripen into an established right; but principally because few of them could be fit for use, till improved and meliorated by the bodily labour of the occupant, which bodily labour, bestowed upon any subject which before lay in common to all men, is uni-

versally allowed to give the fairest and most reasonable title to an exclusive property therein.

THE article of food was a more immediate call, and therefore a more early consideration. Such as were not contented with the spontaneous product of the earth, sought for a more solid refreshment in the flesh of beasts, which they obtained by hunting. But the frequent disappointments incident to that method of provision, induced them to gather together such animals as were of a more tame and sequacious nature; and to establish a permanent property in their flocks and herds in order to sustain themselves in a less precarious manner, partly by the milk of the dams, and partly by the flesh of the young. The support of these their cattle made the article of *water* also a very important point. And therefore, the Book of Genesis (the most venerable monument of antiquity, considered merely with a view to history) will furnish us with frequent instances of violent contentions concerning wells; the exclusive property of which appears to have been established in the first digger or occupant, even in such places where the ground and herbage remained yet in common. Thus we find Abraham, who was but a sojourner, asserting his right to a well in the country of Abimelech, and exacting an oath for his security, "because he had digged that well[e]." And Isaac, about ninety years afterwards, reclaimed this his [6] father's property; and after much contention with the Philistines, was suffered to enjoy it in peace[f].

ALL this while the soil and pasture of the earth remained still in common as before, and open to every occupant: except perhaps in the neighbourhood of towns, where the necessity of a sole and exclusive property in lands (for the sake of agriculture) was earlier felt, and therefore more readily complied with. Otherwise, when the multitude of men and cattle had consumed every convenience on one spot of ground, it was deemed a natural right to seise upon and occupy such other lands as would more easily supply their necessities. This practice is still retained among the wild and uncultivated nations that have never been formed into civil states,

[e] Gen. xxi. 30. [f] Gen xxvi. 15. 18, &c.

like the Tartars and others in the East, where the climate itself, and the boundless extent of their territory, conspire to retain them still in the same savage state of vagrant liberty, which was universal in the earliest ages; and which, Tacitus informs us, continued among the Germans till the decline of the Roman empire[g]. We have also a striking example of the same kind in the history of Abraham and his nephew Lot[h]. When their joint substance became so great, that pasture and other conveniences grew scarce, the natural consequence was, that a strife arose between their servants; so that it was no longer practicable to dwell together. This contention Abraham thus endeavoured to compose: "Let there be no strife, "I pray thee, between me and thee. Is not the whole land "before thee? Separate thyself, I pray thee, from me. If "thou wilt take the left hand, then I will go to the right: "or if thou depart to the right hand, then I will go to the "left." This plainly implies an acknowledged right, in either, to occupy whatever ground he pleased, that was not pre-occupied by other tribes. "And Lot lifted up his eyes, "and beheld all the plain of Jordan, that it was well watered "every where, even as the garden of the Lord. Then Lot "chose him all the plain of Jordan, and journeyed east; and "Abraham dwelt in the land of Canaan."

[7] Upon the same principle was founded the right of migration, or sending colonies to find out new habitations, when the mother country was overcharged with inhabitants; which was practised as well by the Phœnicians and Greeks, as the Germans, Scythians, and other northern people. And, so long as it was confined to the stocking and cultivation of desert uninhabited countries, it kept strictly within the limits of the law of nature. But how far the seising on countries already peopled, and driving out or massacring the innocent and defenceless natives, merely because they differed from their invaders in language, in religion, in customs, in government, or in colour; how far such a conduct was consonant to nature, to reason, or to Christianity, deserved well to be considered by those, who have rendered their names immortal by thus civilizing mankind.

[g] *Colunt discreti et diversi; ut fons, ut campus, ut nemus placuit. De mor. Ger.* 16.

[h] Gen. c. xiii.

As the world by degrees grew more populous, it daily became more difficult to find out new spots to inhabit, without encroaching upon former occupants: and, by constantly occupying the same individual spot, the fruits of the earth were consumed, and it's spontaneous produce destroyed, without any provision for a future supply or succession. It therefore became necessary to pursue some regular method of providing a constant subsistence; and this necessity produced, or at least promoted and encouraged, the art of agriculture. And the art of agriculture, by a regular connexion and consequence, introduced and established the idea of a more permanent property in the soil, than had hitherto been received and adopted. It was clear that the earth would not produce her fruits in sufficient quantities, without the assistance of tillage: but who would be at the pains of tilling it, if another might watch an opportunity to seise upon and enjoy the product of his industry, art, and labour? Had not therefore a separate property in lands, as well as moveables, been vested in some individuals, the world must have continued a forest, and men have been mere animals of prey; which, according to some philosophers, is the genuine state of nature. Whereas [8] now (so graciously has Providence interwoven our duty and our happiness together) the result of this very necessity has been the ennobling of the human species, by giving it opportunities of improving it's *rational* faculties, as well as of exerting its *natural*. Necessity begat property: and in order to insure that property, recourse was had to civil society, which brought along with it a long train of inseparable concomitants; states, government, laws, punishments, and the public exercise of religious duties. Thus connected together, it was found that a part only of society was sufficient to provide, by their manual labour, for the necessary subsistence of all; and leisure was given to others to cultivate the human mind, to invent useful arts, and to lay the foundations of science.

The only question remaining is, how this property became actually vested: or what it is that gave a man an exclusive right to retain in a permanent manner that specific land, which before belonged generally to every body, but particularly to nobody. And, as we before observed that occupancy gave the

right to the temporary *use* of the soil, so it is agreed upon all hands, that occupancy gave also the original right to the permanent property in the *substance* of the earth itself: which excludes every one else but the owner from the use of it. There is, indeed, some difference among the writers on natural law, concerning the reason why occupancy should convey this right, and invest one with this absolute property: Grotius and Puffendorf insisting that this right of occupancy is founded on a tacit and implied assent of all mankind, that the first occupant should become the owner; and Barbeyrac, Titius, Mr. Locke, and others, holding, that there is no such implied assent, neither is it necessary that there should be; for that the very act of occupancy, alone, being a degree of bodily labour, is, from a principle of natural justice, without any consent or compact, sufficient of itself to gain a title—a dispute that savours too much of nice and scholastic refinement. However, both sides agree in this, that occupancy is the thing by which the title was in fact originally gained;
[9] every man seising to his own continued use such spots of ground as he found most agreeable to his own convenience, provided he found them unoccupied by any one else.

Property, both in lands and moveables, being thus originally acquired by the first taker, which taking amounts to a declaration that he intends to appropriate the thing to his own use, it remains in him, by the principles of universal law, till such time as he does some other act which shews an intention to abandon it; for then it becomes, naturally speaking, *publici juris* once more, and is liable to be again appropriated by the next occupant. So if one is possessed of a jewel, and casts it into the sea or a public highway, this is such an express dereliction, that a property will be vested in the first fortunate finder that will seise it to his own use. But if he hides it privately in the earth or other secret place, and it is discovered, the finder acquires no property therein; for the owner hath not by this act declared any intention to abandon it, but rather the contrary: and if he loses or drops it by accident, it cannot be collected from thence, that he designed to quit the possession; and therefore in such case the property still remains in the loser, who may claim it again of the

finder. And this, we may remember, is the doctrine of the law of England, with relation to treasure trove [1].

But this method of one man's abandoning his property, and another seising the vacant possession, however well founded in theory, could not long subsist in fact. It was calculated merely for the rudiments of civil society, and necessarily ceased among the complicated interests and artificial refinements of polite and established governments. In these it was found, that what became inconvenient or useless to one man, was highly convenient and useful to another; who was ready to give in exchange for it some equivalent, that was equally desirable to the former proprietor. Thus mutual convenience introduced commercial traffic, and the reciprocal transfer of property by sale, grant, or conveyance: which may be considered either as a continuance of the original possession which the first occupant had; or as an abandoning of the thing by the present owner, and an immediate successive occupancy of the same by the new proprietor. The voluntary dereliction of the owner, and delivering the possession to another individual, amount to a transfer of the property: the proprietor declaring his intention no longer to occupy the thing himself, but that his own right of occupancy shall be vested in the new acquirer. Or, taken in the other light, if I agree to part with an acre of my land to Titius, the deed of conveyance is an evidence of my intending to abandon the property: and Titius, being the only or first man acquainted with such my intention, immediately steps in and seises the vacant possession: thus the consent expressed by the conveyance gives Titius a good right against me; and possession, or occupancy, confirms that right against all the world besides. [10]

The most universal and effectual way of abandoning property, is by the death of the occupant: when, both the actual possession and intention of keeping possession ceasing, the property which is founded upon such possession and intention ought also to cease of course. For, naturally speaking, the instant a man ceases to be, he ceases to have any dominion:

[1] See Vol. I. p. 295.

else if he had a right to dispose of his acquisitions one moment beyond his life, he would also have a right to direct their disposal for a million of ages after him: which would be highly absurd and inconvenient. All property must therefore cease upon death, considering men as absolute individuals, and unconnected with civil society: for, then, by the principles before established, the next immediate occupant would acquire a right in all that the deceased possessed. But as, under civilized governments which are calculated for the peace of mankind, such a constitution would be productive of endless disturbances, the universal law of almost every nation (which is a kind of secondary law of nature) has either given the dying person a power of continuing his property, by disposing of his possessions by will; or, in case he neglects to dispose of it, or is not permitted to make any dis-
[11] position at all, the municipal law of the country then steps in, and declares who shall be the successor, representative, or heir of the deceased; that is, who alone shall have a right to enter upon this vacant possession, in order to avoid that confusion which it's becoming again common would [k] occasion. And farther, in case no testament be permitted by the law, or none be made, and no heir can be found so qualified as the law requires, still, to prevent the robust title of occupancy from again taking place, the doctrine of escheats is adopted in almost every country; whereby the sovereign of the state, and those who claim under his authority, are the ultimate heirs, and succeed to those inheritances to which no other title can be formed.

The right of inheritance, or descent to the children and relations of the deceased, seems to have been allowed much earlier than the right of devising by testament. We are apt to conceive at first view that it has nature on its side; yet we often mistake for nature what we find established by long and inveterate custom. It is certainly a wise and effectual, but clearly a political, establishment; since the permanent right of property, vested in the ancestor himself, was no *natural*,

[k] It is principally to prevent any vacancy of possession, that the civil law considers father and son as one person; so that upon the death of either, the inheritance does not so properly descend, as continue in the hands of the survivor. *Ff.* 28. 2. 11.

but merely a *civil* right. It is true, that the transmission of one's possessions to posterity has an evident tendency to make a man a good citizen and a useful member of society: it sets the passions on the side of duty, and prompts a man to deserve well of the public, when he is sure that the reward of his services will not die with himself, but be transmitted to those with whom he is connected by the dearest and most tender affections. Yet, reasonable as this foundation of the right of inheritance may seem, it is probable that its immediate original arose not from speculations altogether so delicate and refined, and, if not from fortuitous circumstances, at least from a plainer and more simple principle. A man's children or nearest relations are usually about him on his death-bed, [12] and are the earliest witnesses of his decease. They become therefore generally the next immediate occupants, till at length, in process of time, this frequent usage ripened into general law. And therefore also in the earliest ages, on failure of children, a man's servants born under his roof were allowed to be his heirs; being immediately on the spot when he died. For, we find the old patriarch Abraham expressly declaring, that "since God had given him no seed, his steward Eliezer, "one born in his house, was his heir[1]."

WHILE property continued only for life, testaments were useless and unknown: and, when it became inheritable, the inheritance was long indefeasible, and the children or heirs at law were incapable of exclusion by will. Till at length it was found, that so strict a rule of inheritance made heirs disobedient and headstrong, defrauded creditors of their just debts, and prevented many provident fathers from dividing or charging their estates as the exigence of their families required. This introduced pretty generally the right of disposing of one's property, or a part of it, by *testament*; that is, by written or oral instructions properly *witnessed* and authenticated, according to the *pleasure* of the deceased, which we therefore emphatically stile his *will*. This was established in some countries much later than in others. With us in England, till modern times, a man could only dispose of one-third of his moveables from his wife and children; and, in general, no will was permitted of lands till the reign of Henry

[1] Gen. xv. 3.

the eighth; and then only of a certain portion: for it was not till after the restoration that the power of devising real property became so universal as at present. (1)

Wills therefore, and testaments, rights of inheritance and successions, are all of them creatures of the civil or municipal laws, and accordingly are in all respects regulated by them; every distinct country having different ceremonies and requisites to make a testament completely valid: neither does any thing vary more than the right of inheritance under different national establishments. [13] In England particularly, this diversity is carried to such a length, as if it had been meant to point out the power of the laws in regulating the succession to property, and how futile every claim must be, that has not its foundation in the positive rules of the state. In personal estates the father may succeed to his children; in landed property he never can be their immediate heir, by any the remotest possibility: in general only the eldest son, in some places only the youngest, in others all the sons together, have a right to succeed to the inheritance: in real estates males are preferred to females, and the eldest male will usually exclude the rest; in the division of personal estates, the females of equal degree are admitted together with the males, and no right of primogeniture is allowed.

This one consideration may help to remove the scruples of many well-meaning persons, who set up a mistaken conscience in opposition to the rules of law. If a man disinherits his son, by a will duly executed, and leaves his estate to a stranger, there are many who consider this proceeding as contrary to natural justice; while others so scrupulously adhere to the supposed intention of the dead, that if a will of lands be attested by only *two* witnesses instead of *three*, which the law requires, they are apt to imagine that the heir is bound in conscience to relinquish his title to the devisee. But both of them certainly proceed upon very erroneous principles, as if, on the one hand, the son had by nature a right to succeed to his father's lands; or as if, on the other hand, the owner was by nature entitled to direct the succession

(1) See post, 375.

of his property after his own decease. Whereas the law of nature suggests, that on the death of the possessor the estate should again become common, and be open to the next occupant, unless otherwise ordered for the sake of civil peace by the positive law of society. The positive law of society, which is with us the municipal law of England, directs it to vest in such person as the last proprietor shall by will, attended with certain requisites, appoint; and, in defect of such appointment, to go to some particular person, who, from the result of certain local constitutions, appears to be the heir at law. [14] Hence it follows, that where the appointment is regularly made, there cannot be a shadow of right in any one but the person appointed: and where the necessary requisites are omitted, the right of the heir is equally strong and built upon as solid a foundation, as the right of the devisee would have been, supposing such requisites were observed.

But, after all, there are some few things, which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common; being such wherein nothing but an usufructuary property is capable of being had: and therefore they still belong to the first occupant, during the time he holds possession of them, and no longer. Such (among others) are the elements of light, air, and water; which a man may occupy by means of his windows, his gardens, his mills, and other conveniences: such also are the generality of those animals which are said to be *ferae naturae*, or of a wild and untameable disposition; which any man may seise upon and keep for his own use or pleasure. All these things, so long as they remain in possession, every man has a right to enjoy without disturbance; but if once they escape from his custody, or he voluntarily abandons the use of them, they return to the common stock, and any man else has an equal right to seise and enjoy them afterwards. (2)

Again; there are other things in which a permanent property *may* subsist, not only as to the temporary use, but also the solid substance; and which yet would be frequently found without a proprietor, had not the wisdom of the law

(2) See post, 402.

provided a remedy to obviate this inconvenience. Such are forests and other waste grounds, which were omitted to be appropriated in the general distribution of lands; such also are wrecks, estrays, and that species of wild animals which the arbitrary constitutions of positive law have distinguished from the rest by the well-known appellation of game. With regard to these and some others, as disturbances and quarrels would frequently arise among individuals, contending about the acquisition of this species of property by first occupancy,
[15] the law has therefore wisely cut up the root of dissension, by vesting the things themselves in the sovereign of the state: or else in his representatives appointed and authorised by him, being usually the lords of manors. (3) And thus the legislature of England has universally promoted the grand ends of civil society, the peace and security of individuals, by steadily pursuing that wise and orderly maxim, of assigning to every thing capable of ownership a legal and determinate owner. (4)

(3) See post, 410.

(4) It is not very easy (as the author seems to be aware,) for the minds of readers, who have been born and bred up in all the habits, and with the feelings of civil society, to admit the truth of this reasoning on the acquisition and transmission of property. The subject is too wide a one to be satisfactorily discussed in a note; but two observations may be made, as important in forming a sound opinion on the whole matter. First, we should have a clear notion of what is meant by natural rights, or rights founded in the law of nature, as far as regards this subject. When we say that a right to devise property of our own acquisition, or to inherit that left undisposed of by our fathers, is a right founded on the law of nature, we commonly mean a right founded on those conclusions of natural reason and justice, which men in almost all civil societies have, as it were, by general consent recognised and established. But it is obvious that the law of nature, thus understood, presupposes the formation, nay, even in some measure the maturity of civil society, and of course along with it the existence of the right of property. Whereas, strictly considered, the law of nature relates to a time anterior to this, and provides for a state of things independent of civil compact. In this point of view it seems correct to say that inheritance and devise are not founded on the law of nature.

But, secondly; in the former sense it may be equally true, that the industrious acquirer of property has a natural right to transmit it to whomsoever he pleases, and that the child has a natural right to inherit what his ancestor shall not have transmitted specially to any other person; that is to say, the wisest persons in all societies have agreed that by the establishment of these two rights certain great purposes of civil union are best answered.

See the early part of the Considerations on the Law of Forfeiture.

CHAPTER THE SECOND.

OF REAL PROPERTY; AND, FIRST, OF CORPOREAL HEREDITAMENTS.

THE objects of dominion or property are *things*, as contra-distinguished from *persons*: and things are by the law of England distributed into two kinds; things *real* and things *personal*. Things real are such as are permanent, fixed, and immoveable, which cannot be carried out of their place; as lands and tenements: things personal are goods, money, and all other moveables; which may attend the owner's person wherever he thinks proper to go.

IN treating of things real, let us consider, first, their several sorts or kinds; secondly, the tenures by which they may be holden; thirdly, the estates which may be had in them; and, fourthly, the title to them, and the manner of acquiring and losing it.

FIRST, with regard to their several sorts or kinds, things real are usually said to consist in lands, tenements, or hereditaments. *Land* comprehends all things of a permanent, substantial nature; being a word of a very extensive signification, as will presently appear more at large. *Tenement* is a word of still greater extent, and though in its vulgar acceptation it is only applied to houses and other buildings, yet in [17] it's original, proper, and legal sense, it signifies every thing that may be *holden*, provided it be of a permanent nature; whether it be of a substantial and sensible, or of an unsubstantial ideal kind. Thus *liberum tenementum*, frank tenement, or freehold, is applicable not only to lands and other solid

objects, but also to offices, rents, commons, and the like[a]: and, as lands and houses are tenements, so is an advowson a tenement; and a franchise, an office, a right of common, a peerage, or other property of the like unsubstantial kind, are all of them, legally speaking, tenements[b]. But an *hereditament*, says sir Edward Coke[c], is by much the largest and most comprehensive expression: for it includes not only lands and tenements, but whatsoever may be *inherited*, be it corporeal or incorporeal, real, personal, or mixed. Thus an heir-loom, or implement of furniture which by custom descends to the heir together with an house, is neither land, nor tenement, but a mere moveable: yet being inheritable, is comprised under the general word hereditament: and so a condition, the benefit of which may descend to a man from his ancestor, is also an hereditament[d]. (1)

Hereditaments then, to use the largest expression, are of two kinds, corporeal and incorporeal. Corporeal consist of such as affect the senses; such as may be seen and handled by the body: incorporeal are not the object of sensation, can neither be seen nor handled, are creatures of the mind, and exist only in contemplation.

Corporeal hereditaments consist wholly of substantial and permanent objects; all which may be comprehended under the general denomination of land only. For *land*, says sir Edward Coke[e], comprehendeth in it's legal signification any ground, soil, or earth whatsoever; as arable, meadows, pastures, woods, moors, waters, marshes, furzes, and heath. It legally

[a] Co. Litt. 6.
[b] *Ibid.* 19, 20.
[c] *Ibid.* 6.
[d] 3 Rep. 2.
[e] Co. Litt. 4.

(1) By a condition is here meant a qualification or restriction annexed to a conveyance of lands, whereby it is provided that in case a particular event does or does not happen, or a particular act is done or omitted to be done, an estate shall commence, be enlarged, or defeated. As an instance of the condition here intended, suppose A to have infeoffed B of an acre of ground upon condition that if his heir should pay the feoffee 20*s*. he and his heir should re-enter, this condition would be an hereditament descending on A's heir after A's death, and if such heir after A's death should pay the 20*s*. he would be entitled to re-enter, and would hold the land, as if it had descended to him. Co. Litt. 201. 214. b.

includeth also all castles, houses, and other buildings: for they consist, saith he, of two things; *land*, which is the foundation, and *structure* thereupon; so that if I convey the land or ground, the structure or building passeth therewith. It is observable that *water* is here mentioned as a species of land, which may seem a kind of solecism; but such is the language of the law: and therefore I cannot bring an action to recover possession of a pool or other piece of water by the name of *water* only; either by calculating it's capacity, as, for so many cubical yards; or, by superficial measure, for twenty acres of water; or by general description, as for a pond, a watercourse, or a rivulet: but I must bring my action for the land that lies at the bottom, and must call it twenty acres of *land covered with water*.[f] For water is a moveable wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary, transient, usufructuary, property therein: wherefore, if a body of water runs out of my pond into another man's, I have no right to reclaim it. But the land, which that water covers, is permanent, fixed, and immoveable: and therefore in this I may have a certain substantial property; of which the law will take notice, and not of the other.

LAND hath also, in it's legal signification, an indefinite extent, upwards as well as downwards. *Cujus est solum, ejus est usque ad coelum*, is the maxim of the law upwards; therefore no man may erect any building, or the like, to overhang another's land: and, downwards, whatever is in a direct line, between the surface of any land and the centre of the earth, belongs to the owner of the surface; as is every day's experience in the mining countries. So that the word "land" includes not only the face of the earth, but every thing under it, or over it. And therefore, if a man grants all his lands, he grants thereby all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows. Not but the particular names of the things are equally sufficient to pass them, except in the instance of [19] water; by a grant of which, nothing passes but a right of fishing[g]: but the capital distinction is this, that by the name

[f] Brownl. 142. [g] Co. Litt. 4.

of a castle, messuage, toft, croft, or the like, nothing else will pass, except what falls with the utmost propriety under the term made use of; but by the name of land, which is *nomen generalissimum*, every thing terrestrial will pass[h].

Co. Litt. 4, 5, 6.

CHAPTER THE THIRD.

OF INCORPOREAL HEREDITAMENTS.

AN incorporeal hereditament is a right issuing out of a thing corporate (whether real or personal) or concerning, or annexed to, or exercisable within, the same[a]. It is not the thing corporate itself, which may consist in lands, houses, jewels, or the like; but something collateral thereto, as a rent issuing out of those lands or houses, or an office relating to those jewels. In short, as the logicians speak, corporeal hereditaments are the substance, which may be always seen, always handled: incorporeal hereditaments are but a sort of accidents, which inhere in and are supported by that substance; and may belong, or not belong to it, without any visible alteration therein. Their existence is merely in idea and abstracted contemplation; though their effects and profits may be frequently objects of our bodily senses. And, indeed, if we would fix a clear notion of an incorporeal hereditament, we must be careful not to confound together the profits produced, and the thing, or hereditament, which produces them. An annuity, for instance, is an incorporeal hereditament: for though the money, which is the fruit or product of this annuity, is doubtless of a corporeal nature, yet the annuity itself, which produces that money, is a thing invisible, has only a mental existence, and cannot be delivered over from hand to hand. So tithes, if we consider the produce of them, as the tenth sheaf or tenth lamb, seem to be completely [21] corporeal; yet they are indeed incorporeal hereditaments: for they being merely a contingent springing right, collateral to or issuing out of lands, can never be the object of sense: that

[a] Co. Litt. 19, 20.

casual share of the annual increase is not, till severed, capable of being shewn to the eye, nor of being delivered into bodily possession. (1)

Incorporeal hereditaments are principally of ten sorts; advowsons, tithes, commons, ways, offices, dignities, franchises, corodies, or pensions, annuities, and rents.

I. Advowson is the right of presentation to a church, or ecclesiastical benefice. Advowson, *advocatio*, signifies *in clientelam recipere*, the taking into protection; and therefore is synonymous with patronage, *patronatus*: and he who has the right of advowson is called the patron of the church. For, when lords of manors first built churches on their own demesnes, and appointed the tithes of those manors to be paid to the officiating ministers, which before were given to the clergy in common, (from whence, as was formerly mentioned [b], arose the division of parishes,) the lord, who thus built a church, and endowed it with glebe or land, had of common right a power annexed of nominating such minister as he pleased (provided he were canonically qualified) to officiate in that church, of which he was the founder, endower, maintainer, or, in one word, the patron [c].

This instance of an advowson will completely illustrate the nature of an incorporeal hereditament. It is not itself the bodily possession of the church and its appendages; but it is a right to give some other man a title to such bodily possession.

[b] Vol. I. pag. 112

[c] This original of the *jus patronatus*, by building and endowing the church, appears also to have been allowed in the Roman empire. *Nov.* 26. *t.* 12. *c.* 2. *Nov.* 118. *c.* 23.

(1) The last clause of this sentence is scarcely expressed with proper precision, and runs into the very error, against which the reader is guarded in the text, of confounding the produce with the thing producing them. "The casual share of the annual increase" is in fact as much an object of sense before severance as after; just as where a number of acres belong to a number of individuals, and are allotted yearly to each in certain proportions, though no one before allotment can say which is his acre, yet undoubtedly each acre is still corporeal, and an object of sense. But the *right* to the casual share is always incorporeal, as well after as before the severance.

The advowson is the object of neither the sight, nor the touch; and yet it perpetually exists in the mind's eye, and in contemplation of law. It cannot be delivered from man to man by any visible bodily transfer, nor can corporal possession be had of it. If the patron takes corporal possession of the [22] church, the church-yard, the glebe or the like, he intrudes on another man's property: for to these the parson has an exclusive right. The patronage can therefore be only conveyed by operation of law, by verbal grant (2), either oral or written, which is a kind of invisible mental transfer: and being so vested it lies dormant and unnoticed, till occasion calls it forth: when it produces a visible corporeal fruit, by entitling some clerk, whom the patron shall please to nominate, to enter, and receive bodily possession of the lands and tenements of the church.

ADVOWSONS are either advowsons *appendant*, or advowsons *in gross*. Lords of manors being originally the only founders, and of course the only patrons, of churches [d], the right of patronage or presentation, so long as it continues annexed to the possession of the manor, as some have done from the foundation of the church to this day, is called an advowson appendant [e]: and it will pass, or be conveyed, together with the manor, as incident and appendant thereto, by a grant of the manor only, without adding any other words [f]. But where the property of the advowson has been once separated from the property of the manor by legal conveyance, it is called an advowson in gross, or at large, and never can be appendant any more; but is for the future annexed to the person of its owner, and not to his manor or lands [g]. (3)

[d] Co. Litt. 119.
[e] *Ibid.* 121.
[f] *Ibid.* 307.
[g] *Ibid.* 120.

(2) Mr. Christian has cited Woodeson's remark upon the inaccuracy of this expression; in no age of the English law could an advowson in gross, *i. e.* by itself, pass by word of mouth, though before the statute of frauds, it might have passed in that manner as an appendage to a manor, which was capable of being so conveyed. But the entire usage of the word "grant" in this passage is unlawyer-like, for every "grant" in law is by deed.

(3) Disappendancy (as it is called) may however be only temporary under certain circumstances, which are collected in Burn's Ecc. Law. tit.

708

Advowsons are also either *presentative*, *collative*, or *donative*[h]: An advowson presentative is where the patron hath a right of presentation to the bishop or ordinary, and moreover to demand of him to institute his clerk, if he finds him canonically qualified; and this is the most usual advowson. An advowson collative is where the bishop and patron are one and the same person: in which case the bishop cannot present to himself; but he does, by the one act of collation, or con-
[23] ferring the benefice, the whole that is done in common cases, by both presentation and institution. An advowson donative is when the king, or any subject by his license, doth found a church or chapel, and ordains that it shall be merely in the gift or disposal of the patron; subject to his visitation only, and not to that of the ordinary; and vested absolutely in the clerk by the patron's deed of donation, without presentation, institution, or induction[i]. This is said to have been antiently the only way of conferring ecclesiastical benefices in England; the method of institution by the bishop not being established more early than the time of archbishop Becket, in the reign of Henry II.[k] And therefore though pope Alexander III.[l], in a letter to Becket, severely inveighs against the *prava consuetudo*, as he calls it, of investiture conferred by the patron only, this however shews what was then the common usage. Others contend that the claim of the bishops to institution is as old as the first planting of Christianity in this island; and in proof of it they allege a letter from the English nobility to the pope in the reign of Henry the third, recorded by Matthew Paris[m], which speaks of presentation to the bishop as a

[h] Co. Litt. 120.
[i] *Ibid.* 344.
[k] Seld. tith. c. 12. § 2.
[l] *Decretal. l.* 3. *t.* 7. *c.* 3.
[m] *A. D.* 1239.

Advowson, s. 3.; and the principle which may be collected from them, seems to require this limitation on the language of the text, *viz.* that where the separation is effected in fee by the lawful owner of the fee, they cannot be reunited by the act and conveyance of the party. They may be separated wrongfully by the owner of a particular estate, and reunite by the action of the owner of the inheritance; they may be separated professedly for a term by the owner of the inheritance, and reunite of themselves on the expiration of the term; or they may be (it is said) lawfully separated in fee by the owners of the inheritance, and reunite by descent, on the death of one intestate, upon the other as heir. Other instances might be given.

thing immemorial. The truth seems to be, that, where the benefice was to be conferred on a mere layman, he was first presented to the bishop, in order to receive ordination, who was at liberty to examine and refuse him: but where the clerk was already in orders, the living was usually vested in him by the sole donation of the patron; till about the middle of the twelfth century, when the pope and his bishops endeavoured to introduce a kind of feodal dominion over ecclesiastical benefices, and, in consequence of that, began to claim and exercise the right of institution universally, as a species of spiritual investiture.

HOWEVER this may be, if, as the law now stands, the true patron *once* waves this privilege of donation, and presents to the bishop, and his clerk is admitted and instituted, the advowson is now become for ever presentative, and shall never [24] be donative any more[n]. For these exceptions to general rules, and common right, are ever looked upon by the law in an unfavourable view, and construed as strictly as possible. If therefore the patron, in whom such peculiar right resides, does once give up that right, the law, which loves uniformity, will interpret it to be done with an intention of giving it up for ever: and will therefore reduce it to the standard of other ecclesiastical livings. (4)

II. A SECOND species of incorporeal hereditaments is that of tithes; which are defined to be the tenth part of the increase, yearly arising and renewing from the profits of lands, the stock upon lands, and the personal industry of the inhabitants: the first species being usually called *predial*, as of corn, grass, hops, and wood[o]: the second *mixed*, as of wool, milk, pigs, *&c.*[p], consisting of natural products, but nurtured and preserved in part by the care of man; and of these the tenth must be paid in gross; the third *personal*, as of manual

[n] Co. Litt. 344. Cro. Jac. 63. [p] *Ibid.*
[o] 1 Roll. Abr. 635. 2 Inst. 649.

(4) So also by 1 G. 1. st. 2. c. 10. if a donative should receive augmentation from Queen Anne's bounty, which it cannot do without the consent of the patron under his hand and seal, it becomes liable to lapse, and subject to the visitation and jurisdiction of the ordinary, as a presentative living.

occupations, trades, fisheries, and the like; and of these only the tenth part of the clear gains and profits is due [q]. (5)

It is not to be expected from the nature of these general commentaries, that I should particularly specify what things are titheable, and what not; the time when, or the manner and proportion in which, tithes are usually due. For this I must refer to such authors as have treated the matter in detail: and shall only observe, that, in general, tithes are to be paid for every thing that yields an annual increase, as corn, hay, fruit, cattle, poultry, and the like; but not for any thing that is of the substance of the earth, or is not of annual increase, as stone, lime, chalk, and the like; nor for creatures that are of a wild nature, or *ferae naturae*, as deer, hawks, *&c.* whose increase, so as to profit the owner, is not annual, but casual [r]. (6) It will rather be our business to consider, 1. The original of the right of tithes. 2. In whom that
[25] right at present subsists. 3. Who may be discharged, either totally or in part from paying them.

1. As to their original, I will not put the title of the clergy to tithes upon any divine right; though such a right certainly commenced, and I believe as certainly ceased, with the Jewish theocracy. Yet an honourable and competent maintenance for the ministers of the gospel is, undoubtedly, *jure divino*; whatever the particular mode of that maintenance may be. For, besides the positive precepts of the new testament, natural reason will tell us, that an order of men, who are separated from the world, and excluded from other lucrative professions, for the sake of the rest of mankind, have a right to be furnished with the necessaries, conveniences, and

[q] 1 Roll. Abr. 656. [r] 2 Inst. 651.

(5) The statute 2 & 3 E. 6. c. 13. directs, as to personal tithes, that only the tenth part of the clear gains should be paid; but the payment of them at all is almost entirely discontinued, except in the articles of mills and fish. Even in these the payment depends entirely upon custom, the statute regulating it by that criterion; and therefore according to that a full tenth, a clear tenth, or less, or nothing at all is paid. See Toller on Tithes, 43. 48.

(6) Both of mines and fossils, however, and of animals *ferae naturae*, tithes may be due by special custom. Toller, 152, 153.

moderate enjoyments of life, at their expence, for whose benefit they forego the usual means of providing them. Accordingly all municipal laws have provided a liberal and decent maintenance for their national priests or clergy: ours in particular have established this of tithes, probably in imitation of the Jewish law: and perhaps, considering the degenerate state of the world in general, it may be more beneficial to the English clergy to found their title on the law of the land, than upon any divine right whatsoever, unacknowledged and unsupported by temporal sanctions.

We cannot precisely ascertain the time when tithes were first introduced into this country. Possibly they were contemporary with the planting of Christianity among the Saxons, by Augustin the monk, about the end of the sixth century. But the first mention of them, which I have met with in any written English law, is in a constitutional decree, made in a synod held *A. D.* 786 [s], wherein the payment of tithes in general is strongly enjoined. This canon or decree, which at first bound not the laity, was effectually confirmed by two kingdoms of the heptarchy, in their parliamentary conventions of estates, respectively consisting of the kings of Mercia and Northumberland, the bishops, dukes, senators, and [26] people. Which was a few years later than the time that Charlemagne established the payment of them in [t] France, and made that famous division of them into four parts; one to maintain the edifice of the church, the second to support the poor, the third the bishop, and the fourth the parochial clergy [u].

The next authentic mention of them is in the *foedus Edwardi et Guthruni*; or the laws agreed upon between king Guthrun the Dane, and Alfred and his son Edward the elder, successive kings of England, about the year 900. This was a kind of treaty between those monarchs, which may be found at large in the Anglo-Saxon laws [w]: wherein it was necessary, as Guthrun was a pagan, to provide for the subsistence of the Christian clergy under his dominion; and

[s] Seld. c. 8. § 2.
[t] *A. D.* 778.
[u] Book I. ch. 11. Seld. c. 6. § 7. Sp. of laws, b. 31. c. 12.
[w] Wilkins, pag. 51.

accordingly, we find [x] the payment of tithes not only *enjoined*, but a *penalty* added, upon non-observance: which law is seconded by the laws of Athelstan [y], about the year 930. And this is as much as can certainly be traced out, with regard to their legal original.

2. We are next to consider the persons to whom they are due. And upon their first introduction (as hath formerly been observed [z]), though every man was obliged to pay tithes in general, yet he might give them to what priests he pleased [a]; which were called *arbitrary* consecrations of tithes; or he might pay them into the hands of the bishop, who distributed among his diocesan clergy the revenues of the church, which were then in common [b]. But, when dioceses were divided into parishes, the tithes of each parish were allotted to its own particular minister; first, by common consent, or the appointment of lords of manors, and afterwards by the written law of the land [c].

[27] However, arbitrary consecrations of tithes took place again afterwards, and became in general use till the time of king John [d]. Which was probably owing to the intrigues of the regular clergy, or monks of the Benedictine and other rules, under archbishop Dunstan and his successors: who endeavoured to wean the people from paying their dues to the secular or parochial clergy (a much more valuable set of men than themselves), and were then in hopes to have drawn, by sanctimonious pretences to extraordinary purity of life, all ecclesiastical profits to the coffers of their own societies. And this will naturally enough account for the number and riches of the monasteries and religious houses, which were founded in those days, and which were frequently endowed with tithes. For a layman, who was obliged to pay his tithes somewhere, might think it good policy to erect an abbey, and there pay them to his own monks; or grant them to some abbey already erected: since, for this donation, which really cost the patron little or nothing, he might, according to the superstition of

[x] *cap.* 6.
[y] *cap.* 1.
[z] Book I. Introd. § 4.
[a] 2 Inst. 646. Hob. 296.
[b] Seld. c. 9. § 4.
[c] *LL. Edgar*, c. 1. & 2. *Canut.* c. 11.
[d] Seld. c. 11.

the times, have masses for ever sung for his soul. But, in process of years, the income of the poor laborious parish priests being scandalously reduced by these arbitrary consecrations of tithes, it was remedied by pope Innocent the [e] third, about the year 1200, in a decretal epistle, sent to the archbishop of Canterbury, and dated from the palace of Lateran: which has occasioned sir Henry Hobart and others to mistake it for a decree of the council of Lateran, held *A. D.* 1179, which only prohibited what was called the infeodation of tithes, or their being granted to mere laymen [f], whereas this letter of pope Innocent to the archbishop enjoined the payment of tithes to the parsons of the respective parishes where every man inhabited, agreeable to what was afterwards directed by the same pope in other countries [g]. This epistle, says sir Edward Coke [h], bound not the lay subjects of this realm: but, being reasonable and just, (and, he might have added, being correspondent to the antient law,) it was allowed [28] of, and so became *lex terrae*. This put an effectual stop to all the arbitrary consecrations of tithes; except some footsteps which still continue in those portions of tithes, which the parson of one parish hath, though rarely, a right to claim in another: for it is now universally held [i], that tithes are due, of common right, to the parson of the parish, unless there be a special exemption. (7) This parson of the parish, we have formerly seen [k], may be either the actual incumbent, or else the appropriator of the benefice: appropriations being a method of endowing monasteries, which seems to have been devised by the regular clergy; by way of substitution to arbitrary consecrations of tithes [l].

3. We observed that tithes are due to the parson of common right, unless by special exemption; let us therefore see,

[e] *Opera Innocent. III. tom.* 2. *pag.* 452
[f] *Decretal. l.* 3. *t.* 30. *c.* 19.
[g] *Ibid. c.* 2. 6.
[h] 2 Inst. 641.
[i] Regist. 46. Hob. 296.
[k] Book I. p. 385.
[l] In extraparochial places the king, by his royal prerogative, has a right to all the tithes. See book I. p. 113. 284.

(7) The origin of portions probably may be found in the circumstance of a lord's estate extending into what has since become two parishes; and the tenants still continuing to pay their tithes to the church which he had founded.

thirdly, who may be exempted from the payment of tithes, and how lands, and their occupiers, may be exempted or discharged from the payment of tithes, either in part or totally; first, by a real composition; or, secondly, by custom or prescription.

First, a real composition is when an agreement is made between the owner of the lands, and the parson or vicar with the consent of the ordinary and the patron, that such lands shall for the future be discharged from payment of tithes, by reason of some land or other real recompence given to the parson, in lieu and satisfaction thereof[m]. This was permitted by law, because it was supposed that the clergy would be no losers by such composition; since the consent of the ordinary, whose duty it is to take care of the church in general; and of the patron, whose interest it is to protect that particular church, were both made necessary to render the composition effectual: and hence have arisen all such compositions as exist at this day by force of the common law. But experience shewing that even this caution was ineffectual, and the pos-
[29] sessions of the church being, by this and other means, every day diminished, the disabling statute, 13 Eliz. c. 10., was made: which prevents, among other spiritual persons, all parsons and vicars from making any conveyances of the estates of their churches, other than for three lives, or twenty-one years. So that now, by virtue of this statute, no real composition made since the 13 Eliz. is good for any longer term than three lives, or twenty-one years, though made by the consent of the patron and ordinary: which has indeed effectually demolished this kind of traffic; such compositions being now rarely heard of, unless by authority of parliament. (8)

[m] 2 Inst. 490. Regist. 98. 13 Rep. 40.

(8) The real recompence mentioned in the text may be a rent-charge issuing out of land, or the doing something to the ease or profit of the parson. A real composition must have had its commencement within time of memory, and its commencement must be shown; in order to establish it, the courts require either the actual production of the deed of composition, or at least some independent proof of its having once existed. The reason for this is stated to be, that if it were otherwise, the church would

SECONDLY, a discharge by custom or prescription, is where time out of mind such person or such lands have been, either partially or totally, discharged from the payment of tithes. And this immemorial usage is binding upon all parties; as it is in it's nature an evidence of universal consent and acquiescence, and with reason supposes a real composition to have been formerly made. This custom or prescription is either *de modo decimandi*, or *de non decimando*.

A *modus decimandi*, commonly called by the simple name of a *modus* only, is where there is by custom a particular manner of tithing allowed, different from the general law of taking tithes in kind, which are the actual tenth part of the annual increase. This is sometimes a pecuniary compensation, as two-pence an acre for the tithe of land: sometimes it is a compensation in work and labour, as that the parson shall have only the twelfth cock of hay, and not the tenth in consideration of the owner's making it for him: sometimes, in lieu of a large quantity of crude or imperfect tithe, the parson shall have a less quantity, when arrived to greater maturity, as a couple of fowls in lieu of tithe-eggs; and the like. Any means, in short, whereby the general law of tithing is altered, and a new method of taking them is introduced, is called a *modus decimandi*, or special manner of tithing.

To make a good and sufficient *modus*, the following rules must be observed. 1. It must be *certain* and *invariable*[n], for payment of different sums will prove it to be no *modus*, that is, no original real composition; because that must have been one and the same, from its first original to the present time. 2. The thing given, in lieu of tithes, must be beneficial to the *parson*, and not for the emolument of *third persons* only[o]; thus a *modus*, to repair the *church* in lieu of tithes, is not good, because that is an advantage to the parish only; but to repair the *chancel* is a good modus, for that is an advantage to the parson. 3. It must be something *different* from the [30]

[n] 1 Keb. 602. [o] 1 Roll. Abr. 649.

would be defrauded, and every bad modus (bad for its rankness) would be turned into a good composition. See Toller on Tithes, 219. Burn, Ec. L. 3. 437., and the cases there referred to.

thing compounded for [p]: one load of hay, in lieu of *all* tithe hay, is no good *modus*; for no parson would *bonâ fide* make a composition to receive less than his due in the same species of tithe; and therefore the law will not suppose it possible for such composition to have existed. 4. One cannot be discharged from payment of one species of tithe, by paying a *modus* for another [q]. Thus a *modus* of 1*d.* for every *milch* cow will discharge the tithe of *milch* kine, but not of *barren* cattle: for tithe is, of common right, due for both; and therefore a *modus* for one shall never be a discharge for the other. 5. The recompence must be in its nature as durable as the tithes discharged by it; that is, an inheritance certain [r]: and therefore, a *modus* that every *inhabitant* of a house shall pay 4*d.* a year, in lieu of the owner's tithes, is no good *modus*; for possibly the house may not be inhabited, and then the recompence will be lost. 6. The *modus* must not be too large, which is called a *rank modus*: as if the real value of the tithes be 60*l. per annum*, and a *modus* is suggested of 40*l.*, this *modus* will not be established: though one of 40*s.* might have been valid [s]. Indeed, properly speaking, the doctrine of *rankness* in a *modus* is a mere rule of evidence, drawn from the improbability of the fact, and not a rule of law [t]. For, in these cases of prescriptive or customary *moduses*, it is
[31] supposed that an original real composition was antiently made; which being lost by length of time, the immemorial usage is admitted as evidence to shew that it once did exist, and that from thence such usage was derived. Now time of memory hath been long ago ascertained by the law to commence from the beginning of the reign of Richard the first [u]; and any custom may be destroyed by evidence of non-existence in any part of the long period from that time to the present; wherefore, as this real composition is sup-

[p] 1 Lev. 179.

[q] Cro. Eliz. 446. Salk. 657.

[r] 2 P. Wms. 462.

[s] 11 Mod. 60.

[t] *Pyke* v. *Dowling*, Hil. 19 Geo. III. C. B. 2 Bl. R. 1257.

[u] 2 Inst. 238, 239. This rule was adopted, when by the statute of Westm. 1. (3 Edw. 1. c. 39.) the reign of Richard I. was made the time of limitation in a writ of right. But, since by the statute 32 Hen. VIII. c. 2. this period (in a writ of right) hath been very rationally reduced to 60 years, it seems unaccountable, that the date of legal prescription or memory should still continue to be reckoned from an æra so very antiquated. See Litt. § 170. 34 Hen. VI. 37. 2 Roll. Abr. 269. pl. 16.

posed to have been an equitable contract, or the full value of the tithes, at the time of making it, if the *modus* set up is so rank and large, as that it beyond dispute exceeds the value of the tithes in the time of Richard the first, this *modus* is (in point of evidence) *felo de se*, and destroys itself. For, as it would be destroyed by any direct evidence to prove it's non-existence at any time since that æra, so also it is destroyed by carrying in itself this internal evidence of a much later original.

A PRESCRIPTION *de non decimando* is a claim to be entirely discharged of tithes, and to pay no compensation in lieu of them. Thus the king by his prerogative is discharged from all tithes[v]. (9) So a vicar shall pay no tithes to the rector, nor the rector to the vicar, for *ecclesia decimas non solvit ecclesiæ*[w]. But these *personal* privileges (not arising from or being annexed to the land) are personally confined to both the king and the clergy; for their tenant or lessee shall pay tithes, though in their own occupation their lands are not generally titheable.[x] And, generally speaking, it is an established rule, that, in *lay* hands, *modus de non decimando non valet*[y]. But spiritual persons or corporations, as monasteries, abbots, [32] bishops, and the like, were always capable of having their

[v] Cro. Eliz. 511.
[w] *Ibid.* 479. 511. Sav. 3. Moor. 910.
[x] Cro. Eliz. 479.
[y] *Ibid.* 511.

(9) In the case of the Earl of *Hertford* v. *Leech*, Gwill. 486. there is rather a strained attempt to refer this prerogative of the king to his being *persona mixta, et sacro oleo unctus*, having the supreme ecclesiastical jurisdiction in him, and being the supreme ordinary that hath the cure of souls. If this were correct, then all the absolute exemptions might in some sense be said to be founded on one principle, that of *ecclesia decimas non solvit ecclesiæ*; but it seems more safe and simple to refer it to mere usage, upon which the king by prerogative may prescribe for the holding free from payment of tithes. Perhaps this may enable us to reconcile the difference which prevails in the books, as to how far this prerogative extends; some stating it, as in the text, to be *merely* personal, (and if so, it is obviously almost nugatory,) others affirming that it includes the king's tenants for years or at will. Neither may be right universally; and yet the decisions both ways may be correct, if they were governed by the particular prescriptions proved or admitted in each case, which from the shortness of some of the printed reports cannot be ascertained. All, however, agree, that where the king aliens the freehold, the privilege does not extend to his patentee. Com. Dig. Dism. E. 2. 2 Woodd. 100. Gwill. 184. 869.

lands totally discharged of tithes by various ways[z]; as, 1. By real composition: 2. By the pope's bull of exemption; 3. By unity of possession; as when the rectory of a parish, and lands in the same parish, both belonged to a religious house, those lands were discharged of tithes by this unity of possession; 4. By prescription; having never been liable to tithes, by being always in spiritual hands: 5. By virtue of their order; as the knights-templars, cistercians, and others, whose lands were privileged by the pope with a discharge of tithes[a]. Though upon the dissolution of abbeys by Hen. VIII. most of these exemptions from tithes would have fallen with them, and the lands become titheable again; had they not been supported and upheld by the statute 31 Hen. VIII. c. 13., which enacts, that all persons who should come to the possession of the lands of any abbey then dissolved, should hold them free and discharged of tithes, in as large and ample a manner as the abbeys themselves formerly held them. And from this original have sprung all the lands, which being in lay hands, do at present claim to be tithe free: for, if a man can shew his lands to have been such abbey-lands, and also immemorially discharged of tithes by any of the means beforementioned, this is now a good prescription *de non decimando*. But he must shew both these requisites; for abbey-lands, without a special ground of discharge, are not discharged of course; neither will any prescription *de non decimando* avail in total discharge of tithes, unless it relates to such abbey-lands. (10)

[z] Hob. 309. Cro. Jac. 608. [a] 2 Rep. 44. Seld. tith. c. 13. § 2.

(10) The 2 H. 5. dissolved all the alien priories and abbeys, as the 27 H. 8. c. 28. did all religious houses whose annual revenue was under 200*l*.; and neither of these statutes contained any such provision as that which is found in the 31 H. 8. c. 13., and which is held not to extend to houses dissolved under the former statutes. Lord Hobart indeed observes, in *Wright* v. *Gerrard*, p. 309., that even of these abbies, if the lands before dissolution paid no tithes by *prescription*, the king or his patentees would hold them also free, for this was not a grant or privilege that needed preservation by any statute; they were not properly lands discharged, but lands uncharged with tithes. But this doctrine, which was not material to the decision of the case, was questioned by Sir T. Plumer M. R. in *Page* v. *Wilson*, 2 Jacob and Walker, 528. and seems to have been virtually overruled in *Penfold* v. *Groome*, ibid. 534.

III. COMMON, or right of common, appears from its very definition to be an incorporeal hereditament: being a profit which a man hath in the land of another; as to feed his beasts, to catch fish, to dig turf, to cut wood, or the like [a]. And hence common is chiefly of four sorts; common of pasture, of piscary, of turbary, and of estovers.

1. COMMON of pasture is a right of feeding one's beasts [33] on another's land: for in those waste grounds, which are usually called commons, the property of the soil is generally in the lord of the manor; as in common fields it is in the particular tenants. This kind of common is either appendant, appurtenant, because of vicinage, or in gross [b].

COMMON *appendant* is a right belonging to the owners or occupiers of arable land, to put commonable beasts upon the lord's waste, and upon the lands of other persons within the same manor. Commonable beasts are either beasts of the plough, or such as manure the ground. This is a matter of most universal right; and it was originally permitted [c], not only for the encouragement of agriculture, but for the necessity of the thing. For, when lords of manors granted out parcels of land to tenants, for services either done or to be done, these tenants could not plough or manure the land without beasts; these beasts could not be sustained without pasture; and pasture could not be had but in the lords' wastes, and on the uninclosed fallow grounds of themselves and the other tenants. The law therefore annexed this right of common, as inseparably incident to the grant of the lands; and this was the original of common appendant; which obtains in Sweden, and the other northern kingdoms, much in the same manner as in England [d]. Common *appurtenant* ariseth from no connection of tenure, nor from any absolute necessity; but may be annexed to lands in other lordships [e], or extend to other beasts, besides such as are generally commonable; as hogs, goats, or the like, which neither plough nor manure the ground. This not arising from any natural propriety or necessity, like common appendant, is therefore

[a] Finch. law. 157.
[b] Co. Litt. 122.
[c] 2 Inst. 86.
[d] Stiernh. *de jure Sueonum*, l. 2. c. 6.
[e] Cro. Car. 482. 1 Jon. 397.

not of general right; but can only be claimed by [special grant or (11)] immemorial usage and prescription[f], which the law esteems sufficient proof of a special grant or agreement for this purpose. Common *because of vicinage*, or neighbourhood, is where the inhabitants of two townships, which lie contiguous to each other, have usually intercom-
[34] moned with one another; the beasts of the one straying mutually into the other's fields, without any molestation from either. This is indeed only a permissive right, intended to excuse what in strictness is a trespass in both, and to prevent a multiplicity of suits: and therefore either township may inclose and bar out the other, though they have intercommoned time out of mind. Neither hath any person of one town a right to put his beasts originally into the other's common: but if they escape, and stray thither of themselves, the law winks at the trespass[g]. Common *in gross*, or at large, is such as is neither appendant nor appurtenant to land, but is annexed to a man's person; being granted to him and his heirs by deed; or it may be claimed by prescriptive right, as by a parson of a church, or the like corporation sole. This is a separate inheritance, entirely distinct from any landed property, and may be vested in one who has not a foot of ground in the manor.

All these species, of pasturable common, may be and usually are limited as to number and time; but there are also commons without stint, and which last all the year. By the statute of Merton, however, and other subsequent statutes[h], the lord of a manor may enclose so much of the waste as he pleases for tillage or woodground, provided he leaves common sufficient for such as are entitled thereto. This enclosure, when justifiable, is called in law, "approving;" an antient expression, signifying the same as "improving[i]." The lord hath the sole interest in the soil; but the interest of the lord and commoner, in the common, are looked upon in law

[f] Co. Litt. 121, 122.
[g] *Ibid.* 122.
[h] 20 Hen. III. c. 4. 29 Geo. II. c. 36. and 31 Geo. II. c. 41.
[i] 2 Inst. 474.

(11) See *Cowlam* v. *Slack*, 15 East, 108., which determined that common appurtenant may be claimed by modern special grant, as well as by prescription.

as mutual. They may both bring actions for damage done, either against strangers, or each other; the lord for the public injury, and each commoner for his private damage [k]. (12)

2, 3. COMMON of *piscary* is a liberty of fishing in another man's water; as common of *turbary* is a liberty of digging turf upon another's ground [l]. There is also a common of digging for coals, minerals, stones, and the like. All these bear a resemblance to common of pasture in many respects; though in one point they go much farther; common of pasture being only a right of feeding on the herbage and vesture of the soil, which renews annually; but common of turbary, and those aftermentioned, are a right of carrying away the very soil itself. [35]

4. COMMON of estovers or *estouviers*, that is, *necessaries*, (from *estoffer*, to furnish,) is a liberty of taking necessary wood, for the use or furniture of a house or farm, from off another's estate. The Saxon word, *bote*, is used by us as synonymous to the French *estovers*: and therefore house-bote is a sufficient allowance of wood, to repair, or to burn in, the house: which

[k] 9 Rep. 113. [l] Co. Litt. 122.

(12) The construction put upon the statute of Merton is, that not merely lords of manors, but any person seised in fee of part of a waste within a manor may approve under the restrictions mentioned in the text. *Glover* v. *Lane*, 3 T. R. 445. The statute of Merton, however, is confined to common of pasture, and though perhaps the lord at common law might have inclosed against common appendant, because it did not arise from express grant, but was an incident to another grant, yet he could not do so against any other right of common. The consequence is, that wherever there exist other rights of common than that of pasture, and the lord desires to approve either at common law, or under the statute, he must do it so as not to interrupt the holders of those other rights in the exercise of them. See *Fawcett* v. *Strickland*, Willes, 57. *Shakespear* v. *Peppin*, 6 T. R. 741. *Grant* v. *Gunner*, 1 Taunt. 435. The two statutes of George the second, cited in the margin, and the 10 G. 3. c. 42., amending them, go rather beyond the statute of Merton for the purpose of encouraging the growth of timber; and without reference to the sufficiency of common left, they impower the owners of wastes, with the consent of the majority in number and value of the commoners, and *vice versâ*, the majority, &c. of the commoners, with the assent of the owners, or any other persons or bodies, with the assent of the owners and majority, &c. of the commoners, to inclose for timber any part of the waste for such time and on such conditions as shall be agreed on. — See Vol. III. 236. &c.

latter is sometimes called fire-bote: plough-bote and cart-bote are wood to be employed in making and repairing all instruments of husbandry; and hay-bote, or hedge-bote, is wood for repairing of hays, hedges, or fences. These botes or estovers must be reasonable ones; and such any tenant or lessee may take off the land let or demised to him, without waiting for any leave, assignment, or appointment of the lessor, unless he be restrained by special covenant to the contrary[m]. (13)

These several species of commons do all originally result from the same necessity as common of pasture; *viz.* for the maintenance and carrying on of husbandry; common of piscary being given for the sustenance of the tenant's family; common of turbary and fire-bote for his fuel; and house-bote, plough-bote, cart-bote, and hedge-bote, for repairing his house, his instruments of tillage, and the necessary fences of his grounds.

IV. A fourth species of incorporeal hereditaments is that of *ways*; or the right of going over another man's ground. I speak not here of the king's highways, which lead from town to town; nor yet of common ways, leading from a village into the fields; but of private ways, in which a particular man may have an interest and a right, though another be owner of the soil. This may be granted on a special permission; as when the owner of the land grants to another a liberty of passing over his grounds, to go to church, to market, or the like: in which case the gift or grant is particular, and confined to the grantee alone: it dies with the person; and, if
[36] the grantee leaves the country, he cannot assign over his right to any other; nor can he justify taking another person in his company[n]. A way may be also by (14) prescription; as if all

[m] Co. Litt. 41. [n] Finch. law, 31.

(13) Though the right of taking estovers result from the same necessity as the right of common, it is clearly not a right of common, when exercised by a tenant on the land demised to him, which the manner of its introduction in this place might lead the student to suppose it was. See post, 122. 144.

(14) The word "custom" should be inserted here, which the author intended to include, probably, under the term "prescription," (though at p. 263. post, he has properly distinguished between the two) for his first instance is a custom, and not a prescription.

the inhabitants of such a hamlet, or all the owners and occupiers of such a farm, have immemorially used to cross such a ground for such a particular purpose: for this immemorial usage supposes an original grant, whereby a right of way thus appurtenant to land or houses may clearly be created. A right of way may also arise by act and operation of law: for, if a man grants me a piece of ground in the middle of his field, he at the same time tacitly and impliedly gives me a way to come at it; and I may cross his land for that purpose without trespass[o]. For when the law doth give any thing to one, it giveth impliedly whatsoever is necessary for enjoying the same[p]. (15) By the law of the twelve tables at Rome, where a man had the right of way over another's land, and the road was out of repair, he who had the right of way might go over any part of the land he pleased: which was the established rule in public as well as private ways. And the law of England, in both cases, seems to correspond with the Roman[q]. (16)

V. OFFICES, which are a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging, are also incorporeal hereditaments;

[o] Finch. law. 63.
[p] Co. Litt. 56.
[q] Lord Raym. 725. 1 Brownl. 212. 2 Show. 28. 1 Jon. 297.

(15) Though this position is undoubtedly true, it is no reason in support of the doctrine laid down in the sentence next before it; for in the instance put, it is not the law, but an individual, that has given me the piece of ground, to the enjoyment of which the way is necessary. The sentence should be, when *any one* doth give any thing to another, he gives impliedly, &c. This is true, and is the foundation of what is called a way of necessity, which is gained not only in the instance put in the text, but in the converse of it, where a man grants his field, and reserves a piece of ground in the middle of it for himself. See 1 Wms. Saund. 323. n. 6. *Pomfret* v. *Ricroft*.

(16) In the case of *Taylor* v. *Whitehead*, Dougl. 745., this position, so far as regards private ways not of necessity, was over-turned, and upon good grounds, — he, that has the use of a way, is in justice presumptively bound to keep it in repair, and permission given to pass in a specific line is not a permission given to pass in any other. "If," said Mr. J. Buller, "this had been a way of necessity, the question would have required consideration; and there it should seem that the same principle, which gave the first way, would, when that was impassable, be held to give also any other." "Highways," said Lord Mansfield, "are governed by a different principle; they are for the public service, and if the usual track is impassable, it is for the general good that people should be entitled to pass in another line."

whether public, as those of magistrates; or private, as of bailiffs, receivers, and the like. For a man may have an estate in them, either to him and his heirs, or for life, or for a term of years, or during pleasure only: save only that offices of public trust cannot be granted for a term of years, especially if they concern the administration of justice, for
[37] then they might perhaps vest in executors and administrators[r]. (17) Neither can any *judicial* office be granted in reversion: because though the grantee may be able to perform it at the time of the grant, yet before the office falls he may become unable and insufficient: but *ministerial* offices may be so granted[s]; for those may be executed by deputy. Also, by statute 5 & 6 Edw. VI. c. 16. no public office (a few only excepted) shall be sold, under pain of disability to dispose of or hold it. (18) For the law presumes that he who buys an office will, by bribery, extortion, or other unlawful means, make his purchase good, to the manifest detriment of the public.

VI. Dignities bear a near relation to offices. Of the nature of these we treated at large in the former book[t]; it will therefore be here sufficient to mention them as a species of incorporeal hereditaments, wherein a man may have a property or estate.

VII. Franchises are a seventh species. Franchise and liberty are used as synonymous terms: and their definition is[u] a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject. Being therefore derived from the crown, they must arise from the king's grant; or in

[r] 9 Rep. 97.
[s] 11 Rep. 4.
[t] See book I. ch. 12.
[u] Finch. l. 164.

(17) It would seem to be equally inconvenient that such offices should be granted in fee or fee-tail; but a distinction is attempted to be made in favour of such grants in the case referred to in the margin; and we have still some instances remaining of shrievalties and similar offices being hereditary.

(18) This statute has been extended in its operation by the 49 G. 3. c. 126. to Scotland and Ireland, and made to include all offices in the gift of the crown, or under the appointment of the East India Company, with certain exceptions specified in the statute. The offence of buying or selling, or in any way contributing to the purchase or sale of any office within the act, is thereby made punishable as a misdemesnor.

some cases may be held by prescription, which, as has been frequently said, presupposes a grant. The kinds of them are various, and almost infinite: I will here briefly touch upon some of the principal; premising only, that they may be vested in either natural persons or bodies politic; in one man or in many: but the same identical franchise, that has before been granted to one, cannot be bestowed on another, for that would prejudice the former grant[w].

To be a county palatine is a franchise, vested in a number of persons. It is likewise a franchise, for a number of persons to be incorporated, and subsist as a body politic; with a power to maintain perpetual succession, and do other corporate acts: and each individual member of such corporation is also said to have a franchise or freedom. Other franchises are, to hold a court leet: to have a manor or lordship; or, at least, to have a lordship paramount: to have waifs, wrecks, estrays, [38] treasure-trove, royal fish, forfeitures, and deodands: to have a court of one's own, or liberty of holding pleas, and trying causes: to have the cognizance of pleas, which is a still greater liberty, being an exclusive right, so that no other court shall try causes arising within that jurisdiction: to have a bailiwick, or liberty exempt from the sheriff of the county; wherein the grantee only, and his officers, are to execute all process: to have a fair or market; with the right of taking toll, either there or at any other public places, as at bridges, wharfs, or the like; which tolls must have a reasonable cause of commencement, (as in consideration of repairs, or the like,) else the franchise is illegal and void[x]: or, lastly, to have a forest, chase, park, warren, or fishery, endowed with privileges of royalty; which species of franchise may require a more minute discussion.

As to a *forest*; this, in the hands of a subject, is properly the same thing with a chase; being subject to the common law, and not to the forest laws[y]. (19) But a *chase* differs

[w] 2 Roll Abr. 191. Keilw. 196. [y] 4 Inst. 314.
[x] 2 Inst. 220.

(19) A forest in the hands of a subject is not necessarily a chase; for the king may grant under the great seal, a forest to a subject with the privileges of forest courts and officers. Manw. Forests, pl. 77. 79. 81.

from a park, in that it is not inclosed, and also in that a man may have a chase in another man's ground as well as in his own, being indeed the liberty of keeping beasts of chase or royal game therein, protected even from the owner of the land, with a power of hunting them thereon. A *park* is an enclosed chase, extending only over a man's own grounds. The word *park* indeed properly signifies an enclosure; but yet it is not every field or common, which a gentleman pleases to surround with a wall or paling, and to stock with a herd of deer, that is thereby constituted a legal park: for the king's grant, or at least immemorial prescription, is necessary to make it so [z]. Though now the difference between a real park and such enclosed grounds is in many respects not very material: only that it is unlawful at common law for any person to kill any beasts of park or chase [a] (20), except such as possess these
[39] franchises of forest, chase, or park. *Free warren* is a similar franchise, erected for preservation or custody (which the word signifies) of beasts and fowls of warren [b]; which, being *ferae naturae*, every one had a natural right to kill as he could; but upon the introduction of the forest laws, at the Norman conquest, as will be shewn hereafter, these animals being looked upon as royal game and the sole property of our savage monarchs, this franchise of free-warren was invented to protect them; by giving the grantee a sole and exclusive power of killing such game so far as his warren extended, on condition of his preventing other persons. A man therefore that has the franchise of warren, is in reality no more than a royal game-keeper; but no man, not even a lord of a manor, could by common law justify sporting on another's soil, or even on his own, unless he had the liberty of free-warren [c]. This franchise is almost fallen into disregard, since the new statutes

[z] Co. Litt. 233. 2 Inst. 199. 11 Rep. 86.

[a] These are properly buck, doe, fox, martin, and roe; but in a common and legal sense extend likewise to all the beasts of the forest: which, besides the other, are reckoned to be hart, hind, hare, boar, and wolf, and in a word, all wild beasts of venery or hunting. (Co. Litt. 233.)

[b] The beasts are hares, conies, and roes; the fowls are either *campestres*, as partridges, rails, and quails; or *sylvestres*, as woodcocks and pheasants; or *aquatiles*, as mallards and herons. (Co. Litt. 233.)

[c] Salk. 637.

(20) See post. p. 419.

for preserving the game; the name being now chiefly preserved in grounds that are set apart for breeding hares and rabbits. There are many instances of keen sportsmen in antient times who have sold their estates, and reserved the free-warren, or right of killing game, to themselves; by which means it comes to pass that a man and his heirs have sometimes free-warren over another's ground [d]. A *free fishery*, or exclusive right of fishing in a public river, is also a royal franchise; and is considered as such in all countries where the feodal polity has prevailed [e]; though the making such grants, and by that means appropriating what it seems to be unnatural to restrain, the use of running water, was prohibited for the future by king John's great charter; and the rivers that were fenced in his time were directed to be laid open, as well as the forests to be disafforested [f]. This opening was extended by the second [g] and third [h] charters of Henry III., to those also that were fenced under Richard I.; so that a franchise of free fishery ought now to be at least as old as the reign of Henry II. This differs from a *several* fishery; because he [40] that has a several fishery must also be (or at least derive his right from) the owner of the soil [i], which in a free fishery is not requisite. It differs also from a *common* of piscary before mentioned, in that the free fishery is an exclusive right, the common of piscary is not so: and therefore in a free fishery, a man has a property in the fish before they are caught: in a common of piscary not till afterwards [k]. Some indeed have considered a *free* fishery not as a royal franchise, but merely as a private grant of a liberty to fish in the *several* fishery of the grantor [l]. But to consider such right as originally a flower of the prerogative, till restrained by *magna charta*, and derived by royal grant (previous to the reign of Richard I.) to such as now claim it by prescription, and to distinguish it (as we have done) from a *several* and a *common* of fishery, may remove some difficulties in respect to this matter, with which our books are embarrassed. For it must be acknowledged, that the rights and distinctions of the three species of fishery

[d] Bro. *Abr.* tit. *Warren*, 3.
[e] Seld. *Mar. Claus. I.* 24. Dufresne, V. 503. Crag. *de Jur. feod. II.* 8. 15.
[f] *cap.* 47. *edit. Oxon.*
[g] *cap.* 20.
[h] 9 Hen. III. c. 16.
[i] *M.* 17 *Edw. IV.* 6. *P.* 18 *Edw. IV.* 4. *T.* 10 *Hen. VII.* 24. 26. *Salk.* 637.
[k] F. N. B. 88. Salk. 637.
[l] 2 Sid. 8.

are very much confounded in our law-books; and that there are not wanting respectable authorities[m] which maintain that a *several* fishery may exist distinct from the property of the soil, and that a *free* fishery implies no exclusive right, but is synonymous with *common* of piscary.

VIII. Corodies are a right of sustenance, or to receive certain allotments of victual and provision for one's maintenance[n]. In lieu of which (especially when due from ecclesiastical persons,) a pension or sum of money is sometimes substituted[o]. And these may be reckoned another species of incorporeal hereditaments; though not chargeable on, or issuing from, any corporeal inheritance, but only charged on the person of the owner in respect of such his inheritance. To these may be added,

IX. Annuities, which are much of the same nature; only that these arise from temporal, as the former from spiritual, persons. An annuity is a thing very distinct from a
[41] rent-charge, with which it is frequently confounded: a rent-charge being a burthen imposed upon and issuing out of *lands*, whereas an annuity is a yearly sum chargeable only upon the *person* of the grantor[p]. Therefore, if a man by deed grant to another the sum of 20*l. per annum*, without expressing out of what lands it shall issue, no land at all shall be charged with it; but it is a mere personal annuity; which is of so little account in the law, that if granted to an eleemosynary corporation, it is not within the statutes of mortmain[q]; and yet a man may have a real estate in it, though his security is merely personal. (22)

X. Rents are the last species of incorporeal hereditaments. The word rent or render, *reditus*, signifies a compensation or return, it being in the nature of an acknowledgment given for the possession of some corporeal inheritance[r].

[m] See them well digested in Hargrave's notes on Co. Litt. 122.
[n] Finch. L. 162.
[o] See book I. ch. 8.
[p] Co. Litt. 144.
[q] *Ibid.* 2.
[r] *Ibid.* 144.

(22) As to annuities for lives, see post. p. 461.

It is defined to be a certain profit issuing yearly out of lands and tenements corporeal. It must be a *profit*; yet there is no occasion for it to be, as it usually is, a sum of money: for spurs, capons, horses, corn, and other matters may be rendered, and frequently are rendered, by way of rent [s]. It may also consist in services or manual operations; as, to plough so many acres of ground, to attend the king or the lord to the wars, and the like; which services in the eye of the law are profits. This profit must also be *certain*; or that which may be reduced to a certainty by either party. It must also issue *yearly*; though there is no occasion for it to issue every successive year; but it may be reserved every second, third, or fourth year [t]; yet, as it is to be produced out of the profits of lands and tenements, as a recompense for being permitted to hold or enjoy them, it ought to be reserved yearly, because those profits do annually arise and are annually renewed. It must *issue out* of the thing granted, and not be part of the land or thing itself; wherein it differs from an exception in the grant, which is always of part of the thing granted [u]. It must, lastly, issue out of *lands and tenements corporeal*; that is, from some inheritance whereunto the owner or grantee of the rent may have recourse to distrein. Therefore a rent [42] cannot be reserved out of an advowson, a common, an office, a franchise, or the like [w]. But a grant of such annuity or sum may operate as a personal contract, and oblige the grantor to pay the money reserved, or subject him to an action of debt [x]: though it doth not affect the inheritance, and is no legal rent in contemplation of law. (23)

[s] Co. Litt. 142.
[t] *Ibid.* 47.
[u] Plowd. 132. 8 Rep. 71.
[w] Co. Litt. 144.
[x] *Ibid.* 47.

(23) With regard to tithes, the statute 32 H. 8. c. 7. has put them, when in the hands of lay impropriators, upon the same footing as corporeal hereditaments, turning them as it were into lands and tenements. But independently of this statute, it should seem, that at common law a rent may be reserved out of tithes with all the properties of a rent, except that of being recoverable by distress. They are the profits of land, and the profits of land are in law the land itself. See *Bally* v. *Wells*, 3 Wils. 25. *Dean, &c. of Windsor* v. *Gover*, 2 Saund. 505. ed. 1824.

There are at common law [y] three manner of rents, rent-service, rent-charge, and rent-seck. *Rent-service* is so called because it hath some corporeal service incident to it, as at the least fealty or the feodal oath of fidelity [z]. For, if a tenant holds his land by fealty, and ten shillings rent; or by the service of ploughing the lord's land, and five shillings rent; these pecuniary rents, being connected with personal services, are therefore called rent-service. And for these, in case they be behind, or arrere, at the day appointed, the lord may distrein of common right, without reserving any special power of distress; provided he hath in himself the reversion, or future estate of the lands and tenements, after the lease or particular estate of the lessee or grantee is expired [a]. A *rent-charge* is where the owner of the rent hath no future interest, or reversion expectant in the land: as where a man by deed maketh over to others his *whole* estate in fee-simple, with a certain rent payable thereout, and adds to the deed a covenant or clause of distress, that if the rent be arrere, or behind, it shall be lawful to distrein for the same. In this case the land is liable to the distress, not of common right, but by virtue of the clause in the deed; and therefore, it is called a rent-*charge*, because in this manner the land is charged with a distress for the payment of it [b]. *Rent-seck*, *reditus siccus*, or barren rent, is in effect nothing more than a rent reserved by deed, but without any clause of distress.

There are also other species of rents, which are reducible to these three: Rents of *assise*, are the certain established rents of the freeholders and antient copyholders of a manor [c], which cannot be departed from or varied. Those of the
[43] freeholders are frequently called *chief*-rents, *reditus capitales*; and both sorts are indifferently denominated *quit*-rents, *quieti reditus*; because thereby the tenant goes quit and free of all other services. When these payments were reserved in silver or white money, they were antiently called *white*-rents, or *blanch-farms*, *reditus albi* [d]; in contradistinction to rents re-

[y] Litt. § 213.
[z] Co. Litt. 142.
[a] Litt. § 215.
[b] Co. Litt. 143.
[c] 2 Inst. 19.
[d] In Scotland this kind of small payment is called *blanch-holding*, or *reditus albae firmae*.

served in work, grain, or baser money, which were called *reditus nigri*, or *black-mail*[e]. *Rack*-rent is only a rent of the full value of the tenement, or near it. A *fee-farm* rent is a rent-charge issuing out of an estate in fee; of at least one-fourth of the value of the lands, at the time of its reservation[f]: for a grant of lands, reserving so considerable a rent, is indeed only letting lands to farm in fee-simple instead of the usual methods for life or years. (24)

THESE are the general divisions of rent; but the difference between them (in respect to the remedy for recovering them) is now totally abolished; and all persons may have the like remedy by distress for rents-seck, rents of assise, and chief-rents, as in case of rents reserved upon lease[g]. (25)

RENT is regularly due and payable upon the land from whence it issues, if no particular place is mentioned in the reservation[h]: but in case of the king, the payment must be either to his officers at the exchequer, or to his receiver in the country[i]. And strictly, the rent is demandable and payable before the time of sunset of the day whereon it is reserved[k]; though perhaps not absolutely due till midnight[l].

WITH regard to the original of rents, something will be said in the next chapter; and, as to distresses and other re-

[e] 2 Inst. 19.
[f] Co. Litt. 143.
[g] Stat. 4 Geo. II. c. 28. (25)
[h] Co. Litt. 201.
[i] 4 Rep. 73.
[k] Co. Litt. 302. 1 Anders. 253.
[l] 1 Saund. 287. Prec. Chanc. 555. Salk. 578.

(24) A fee-farm rent is not necessarily a rent-charge; Mr. Hargrave indeed thought that it *could only be a rent-service*, and that the quantum of the rent was immaterial. Co. Litt. 143. n. 235. But in the case of *Bradbury* v. *Wright*, Douglas Rep. 4th ed., are notes by the reporter himself; and the late learned editor, which explain the mistake both of Blackstone and Hargrave, and show, I think, satisfactorily, that the former is correct in his account of the rent, except in calling it a rent-charge, which it may, but need not necessarily, be.

(25) The statute applies only to such rents as have been answered or paid for three years within the space of twenty years before 21st Jan. 1730, or have been since created.

medies for their recovery, the doctrine relating thereto, and the several proceedings thereon, these belong properly to the third part of our commentaries, which will treat of civil injuries, and the means whereby they are redressed.

CHAPTER THE FOURTH.

OF THE FEODAL SYSTEM.

IT is impossible to understand, with any degree of accuracy, either the civil constitution of this kingdom, or the laws which regulate it's landed property, without some general acquaintance with the nature and doctrine of feuds, or the feodal law: a system so universally received throughout Europe upwards of twelve centuries ago, that sir Henry Spelman[a] does not scruple to call it the law of nations in our western world. This chapter will be therefore dedicated to this inquiry. And though, in the course of our observations in this and many other parts of the present book, we may have occasion to search pretty highly into the antiquities of our English jurisprudence, yet surely no industrious student will imagine his time misemployed, when he is led to consider that the obsolete doctrines of our laws are frequently the foundation upon which what remains is erected; and that it is impracticable to comprehend many rules of the modern law, in a scholar-like scientifical manner, without having recourse to the antient. Nor will these researches be altogether void of rational entertainment as well as use: as in viewing the majestic ruins of Rome or Athens, of Balbec or Palmyra, it administers both pleasure and instruction to compare them with the draughts of the same edifices, in their pristine proportion and splendour.

THE constitution of feuds[b] had its original from the [45] military policy of the northern or Celtic nations, the Goths,

[a] Of parliaments, 57.

[b] See Spelman, of feuds; and Wright, of tenures, *per tot.*

the Huns, the Franks, the Vandals, and the Lombards, who all migrating from the same *officina gentium*, as Crag very justly entitles it[c], poured themselves in vast quantities into all the regions of Europe, at the declension of the Roman empire. It was brought by them from their own countries, and continued in their respective colonies as the most likely means to secure their new acquisitions: and to that end, large districts or parcels of land were allotted by the conquering general to the superior officers of the army, and by them dealt out again in smaller parcels or allotments to the inferior officers and most deserving soldiers[d]. These allotments were called *feoda*, feuds, fiefs, or fees; which last appellation in the northern languages[e] signifies a conditional stipend or reward[f]. Rewards or stipends they evidently were: and the condition annexed to them was, that the possessor should do service faithfully, both at home and in the wars, to him by whom they were given; for which purpose he took the *juramentum fidelitatis*, or oath of fealty[g]: and in case of the breach of this condition and oath, by not performing the stipulated service, or by deserting the lord in battle, the lands were again to revert to him who granted them[h].

Allotments, thus acquired, naturally engaged such as accepted them to defend them: and, as they all sprang from
[46] the same right of conquest, no part could subsist independent of the whole; wherefore all givers as well as receivers were mutually bound to defend each other's possessions. But, as that could not effectually be done in a tumultuous irregular way, government, and to that purpose subordination, was necessary. Every receiver of lands, or feudatory, was therefore bound, when called upon by his benefactor, or immediate

[c] *De jure feod.* 19, 20.

[d] Wright, 7.

[e] Spelm. *Gl.* 216.

[f] Pontoppidan, in his history of Norway, (page 290) observes, that in the northern languages odh signifies *proprietas* and all *totum*. Hence he derives the odhal right in those countries; and thence too perhaps is derived the *udal* right in Finland, &c. (See Mac Doual, Inst. part 2.) Now the transposition of these northern syllables, allodh, will give us the true etymology of the *allodium*, or absolute property of the feudists; as, by a similar combination of the latter syllable with the word fee, (which signifies, we have seen, a conditional reward or stipend) feeodh or *feodum* will denote stipendiary property.

[g] See this oath explained at large in *Feud. l.* 2. *t.* 7.

[h] *Feud. l.* 2. *t.* 24.

lord of his feud or fee, to do all in his power to defend him. Such benefactor or lord was likewise subordinate to, and under the command of, his immediate benefactor or superior; and so upwards to the prince or general himself: and the several lords were also reciprocally bound, in their respective gradations, to protect the possessions they had given. Thus the feodal connection was established, a proper military subjection was naturally introduced, and an army of feudatories was always ready enlisted, and mutually prepared to muster, not only in defence of each man's own several property, but also in defence of the whole, and of every part of this their newly-acquired country[1]; the prudence of which constitution was soon sufficiently visible in the strength and spirit with which they maintained their conquests. (1)

Wright, 8.

---

(1) Mr. Hallam gives an account of the origin of the feudal system rather different from that in the text. He says, that when the Germanic tribes poured down upon the empire, the conquerors made partition of the lands between themselves and the original possessors, some tribes taking a larger, some a less portion to themselves. The estates of the conquerors were termed allodial, subject to no burden but that of public defence, and inheritable. Besides these lands, others also were reserved out of the share of the conquered for the crown, partly to maintain its dignity, partly to supply its munificence. These were the fiscal lands, and for the greater part were gradually granted out under the name of benefices; and if the donation was not accompanied by any express reservation of military service, yet the beneficiary was undoubtedly more closely connected with the crown, and bound to more constant service than the allodial proprietor.

Mr. Hallam thinks that there is no satisfactory proof that these benefices were ever resumable at pleasure, but that from the beginning they were ordinarily granted for the life of the grantee. Very early they became hereditary, and as soon as they did so, they led to the practice of subinfeudation, which he deems the true commencement of the system of feudal tenures.

Still at this point the far larger part of the lands remained allodial, and the extension of the feudal system is to be attributed, in his opinion, to the forlorn and unprotected state in which the allodial proprietor found himself during the period of anarchy and private warfare, which followed soon after the death of Charlemagne. In those times, the connection between the beneficiary and the vasal was a protection to both: the former abstained from acts of violence against the latter, and both together protected each other against the attacks of others; while the isolated allodialist, to whom the crown in its weakness could afford no succour, was left a com-

The universality and early use of this feodal plan, among all those nations, which in complaisance to the Romans we

---

mon prey for all. This led to a voluntary subjection of themselves to feudal lords upon feudal conditions, and to the gradual diminution, though not extinction, of allodial estates.

Mr. Hallam mentions a custom which, as occasioned by the same state of society, certainly adds some credit to this theory, I mean the custom of commendation. This was a kind of personal feudism; the lord was bound to protect the person and his lands who so commended himself to him, for which he received a stipulated sum of money, called salvamentum. The vasal performed homage, but the connection had no reference to land, was not always burdened with the condition of military service, and seems to have been capable of dissolution, at the pleasure of the vasal.

This manner of accounting for the rise of the feudal system appears to me more reasonable and natural than the common theory, that which is stated in the text; and principally on two grounds, 1st, What we know of the composition of the Germanic armies who overran the empire makes it very unlikely either that the general would be actuated by so refined a policy as that supposed, or that the soldiery would have submitted to take their estates as gifts to be held of him, or their superior officers, on feudal conditions. Every one is familiar with the story of Clovis and the vase of Soissons. If he was unable to select a single jewel out of the spoil for himself by his own authority, and the meanest soldier considered his own right to his share to stand on the same footing precisely as that of the king to his, is it probable that the whole army would submit to take their lands on any other footing, than that of their being the respective portions of the territory to which their own swords had given them an independent title?

2dly. The theory assumes, that the foundation of the feudal system was the public defence; this also appears to me a refined after-thought not warranted by the fact. No doubt, even if the first conquerors took their lands allodially, as Mr. Hallam supposes, they were bound on general principles, principles among the very earliest in the growth of civil society, to come forward in defence of the public safety. But the feudal principle is a private one of mutual defence against private dangers; it was adapted to meet that state of anarchy and private warfare, in which individuals did not look to the crown or the laws, but to their own strength, protectors, or dependents, for safety against violence and oppression. The vasal took his oath of fealty to his immediate lord, and to no other, and the oath was without any reservation. Accordingly, it was a part of the law to define under what circumstances the vasal was bound, upon pain of losing his fief, to follow his lord, even in his wars against the king; and the very circumstance of a limitation of cases being made, seems to imply a time when he was bound to do so in all cases. In some districts, indeed, the vasal owed no service to the king; and in others, he was only bound to follow the lord in his wars to the limits of the lord's territory. It is not surprising, however, that English lawyers should have adopted an opposite theory,

still call barbarous, may appear from what is recorded[k] of the Cimbri and Teutones, nations of the same northern original as those whom we have been describing, at their first irruption into Italy about a century before the Christian æra. They demanded of the Romans, "*ut martius populus aliquid* "*sibi terrae daret, quasi stipendium; caeterum, ut vellet, mani-* "*bus atque armis suis uteretur.*" The sense of which may be thus rendered; they desired stipendiary lands (that is, feuds) to be allowed them, to be held by military and other personal services, whenever their lord should call upon them. This was evidently the same constitution that displayed itself more fully about seven hundred years afterwards; when the Salii, Burgundians, and Franks broke in upon Gaul, the Visigoths on Spain, and the Lombards upon Italy; and introduced [47] with themselves this northern plan of polity, serving at once to distribute and to protect the territories they had newly gained. And from hence, too, it is probable that the emperor Alexander Severus[l] took the hint of dividing lands conquered from the enemy among his generals and victorious soldiery, duly stocked with cattle and bondmen, on condition of receiving military service from them and their heirs for ever.

Scarce had these northern conquerors established themselves in their new dominions, when the wisdom of their constitutions, as well as their personal valour, alarmed all the princes of Europe, that is, of those countries which had

[k] *L. Florus, l.3. c. 3.*

[l] "*Sola, quae de hostibus capta sunt,* "*limitaneis ducibus & militibus donavit;* "*ita ut eorum ita essent, si haeredes illo-* "*rum militarent, nec unquam ad pri-* "*vatos pertinerent: dicens attentius* "*illos militaturos, si etiam sua rura* "*defenderent. Addidit sane his et ani-* "*malia et servos, ut possent colere quod* "*acceperant; ne per inopiam hominum* "*vel per senectutem desererentur rura* "*vicina barbariae, quod turpissimum ille* "*ducebat.*" (Æl. Lamprid. *in vita Alex. Severi.*)

---

theory, because in England the system, *as a whole*, was introduced at once by a powerful and politic sovereign, who made it, what they assert it always was, a great political measure of military defence. William received the fealty not only of his own vasals, those who held of him in chief, but of their vasals also; and thenceforward the oath of fealty to a subject in England was accompanied with the reservation to be found in Littleton's Precedent, given in s. 85. *Salve la foy, que jeo doy a nostre seignior le roy.*

Hallam's M. Ages, ch. 2. p. 1. ch. 8. p. 2. See also Robertson's Cha. V. vol. 1. n. (8). s. 1. p. 18. H.

formerly been Roman provinces, but had revolted, or were deserted by their old masters, in the general wreck of the empire. Wherefore most, if not all, of them thought it necessary to enter into the same or a similar plan of policy. For whereas, before, the possessions of their subjects were perfectly *allodial*, (that is, wholly independent, and held of no superior at all,) now they parcelled out their royal territories, or persuaded their subjects to surrender up and retake their own landed property, under the like feodal obligations of military fealty[m]. And thus, in the compass of a very few years, the feodal constitution, or the doctrine of tenure, extended itself over all the western world. Which alteration of landed property, in so very material a point, necessarily drew after it an alteration of laws and customs: so that the feodal laws soon drove out the Roman, which had hitherto universally obtained, but now became for many centuries lost and forgotten; and Italy itself (as some of the civilians, with more spleen than judgment, have expressed it) *belluinas, atque ferinas, immanesque Longobardorum leges accepit*[n].

[48] But this feodal polity, which was thus by degrees established over all the continent of Europe, seems not to have been received in this part of our island, at least not universally, and as a part of the national constitution, till the reign of William the Norman[o]. Not but that it is reasonable to believe, from abundant traces in our history and laws, that even in the times of the Saxons, who were a swarm from what sir William Temple calls the same northern hive, something similar to this was in use: yet not so extensively, nor attended with all the rigour that was afterwards imported by the Normans. For the Saxons were firmly settled in this island, at least as early as the year 600: and it was not till two centuries after, that feuds arrived to their full vigour and maturity, even on the continent of Europe[p].

This introduction, however, of the feodal tenures into England, by king William, does not seem to have been effected immediately after the conquest, nor by the mere arbitrary will

[m] Wright, 10.
[n] Gravin. *Orig. l.* 1. § 139.
[o] Spelm. *Gloss.* 218. Bract. *l.* 2. *c.* 16. § 7.
[p] Crag. *t.* 2. *t.* 4.

and power of the conqueror; but to have been gradually established by the Norman barons, and others, in such forfeited lands as they received from the gift of the conqueror, and afterwards universally consented to by the great council of the nation long after his title was established. Indeed, from the prodigious slaughter of the English nobility at the battle of Hastings, and the fruitless insurrections of those who survived, such numerous forfeitures had accrued, that he was able to reward his Norman followers with very large and extensive possessions: which gave a handle to the monkish historians, and such as have implicitly followed them, to represent him as having by right of the sword seised on all the lands of England, and dealt them out again to his own favourites. A supposition, grounded upon a mistaken sense of the word *conquest*; which, in it's feodal acceptation, signifies no more than *acquisition*; and this has led many hasty writers into a strange historical mistake, and one which, upon the slightest examination, will be found to be most untrue. However, certain it is, that the Normans now began to gain very [49] large possessions in England; and their regard for the feodal law under which they had long lived, together with the king's recommendation of this policy to the English, as the best way to put themselves on a military footing, and thereby to prevent any future attempts from the continent, were probably the reasons that prevailed to effect it's establishment here by law. And, though the time of this great revolution in our landed property cannot be ascertained with exactness, yet there are some circumstances that may lead us to a probable conjecture concerning it. For we learn from the Saxon chronicle [q], that in the nineteenth year of king William's reign an invasion was apprehended from Denmark; and the military constitution of the Saxons being then laid aside, and no other introduced in it's stead, the kingdom was wholly defenceless: which occasioned the king to bring over a large army of Normans and Bretons, who were quartered upon every landholder, and greatly oppressed the people. This apparent weakness, together with the grievances occasioned by a foreign force, might co-operate with the king's remonstrances, and the better incline the nobility to listen to his

[q] *A. D.* 1085.

proposals for putting them in a posture of defence. For, as soon as the danger was over, the king held a great council to inquire into the state of the nation[r]; the immediate consequence of which was the compiling of the great survey called domesday-book, which was finished in the next year (2): and in the latter end of that very year the king was attended by all his nobility at Sarum; where all the principal landholders submitted their lands to the yoke of military tenure, became the king's vasals, and did homage and fealty to his person[s]. This may possibly have been the æra of formally introducing the feodal tenures by law; and, perhaps, the very law, thus made at the council of Sarum, is that which is still extant[t], [50] and couched in these remarkable words: *Statuimus, ut omnes "liberi homines foedere et sacramento affirment, quod intra et "extra universum regnum Angliæ quod olim vocabatur regnum "Britanniæ, Wilhelmo regi domino suo fideles esse volunt; "terras et honores illius omni fidelitate ubique servare cum eo, "et contra inimicos et alienigenas defendere."* The terms of this law (as sir Martin Wright has observed[u]) are plainly feodal: for, first, it requires the oath of fealty, which made, in the sense of the feudists, every man that took it a tenant or vasal: and, secondly, the tenants obliged themselves to defend their lord's territories and titles against all enemies foreign and domestic. But what clearly evinces the legal establishment of this system, is another law of the same collection[w], which exacts the performance of the military feodal services, as ordained by the general council. *"Omnes "comites, et barones, et milites, et servientes, et universi liberi "homines totius regni nostri praedicti, habeant et teneant se "semper bene in armis et in equis, ut decet et oportet: et sint "semper prompti et bene parati, ad servitium suum integrum "nobis explendum et peragendum, cum semper opus adfuerit:*

[r] *Rex tenuit magnum concilium, et graves sermones habuit cum suis proceribus de hac terra; quo modo incoleretur, et a quibus hominibus. Chron. Sax. ibid.*

[s] *Omnes praedia tenentes, quotquot essent notae melioris per totam Angliam, ejus homines facti sunt, et omnes se illi subdidere, ejusque facti sunt vasalli, ac ei fidelitatis juramenta praestiterunt, se contra alios quoscunque illi fidos futuros. Chron. Sax. A. D. 1086.*

[t] *cap. 52.* Wilk. 228.

[u] Tenures, 66.

[w] *cap. 58.* Wilk. 288.

(2) See post, p. 99. (n.)

" *secundum quod nobis debent de feodis et tenementis suis de*
" *jure facere, et sicut illis statuimus per commune consilium totius*
" *regni nostri prædicti, et illis dedimus et concessimus in feodo*
" *jure haereditario. Hoc praeceptum non sit violatum ullo modo*
" *super forisfacturam nostram plenam.*"

THIS new polity, therefore, seems not to have been *imposed* by the conqueror, but nationally and freely adopted by the general assembly of the whole realm, in the same manner as other nations of Europe had before adopted it, upon the same principle of self-security. And, in particular, they had the recent example of the French nation before their eyes; which had gradually surrendered up all it's allodial or free lands into the king's hands, who restored them to the owners as a *beneficium* or feud, to be held to them and such of their heirs as they previously nominated to the king; and thus, by degrees, all the allodial estates in France were converted into feuds, and the freemen became the vasals of the crown [x]. The only difference between this change of tenures in France, and that in England, was, that the former was effected gradually by [51] the consent of private persons, the latter was done at once, all over England, by the common consent of the nation [y]. (3)

IN consequence of this change, it became a fundamental maxim and necessary principle (though in reality a mere fiction) of our English tenures, " that the king is the uni-
" versal lord and original proprietor of all the lands in his
" kingdom [z]; and that no man doth or can possess any part
" of it, but what has mediately or immediately been derived
" as a gift from him, to be held upon feodal services." For this being the real case in pure, original, proper feuds, other

[x] Montesq. Sp. L. b. 31. c. 8.

[y] Pharaoh thus acquired the dominion of all the lands in Egypt, and granted them out to the Egyptians, reserving an annual render of the fifth part of their value. (Gen. c. xlvii.)

[z] *Tout fuit in luy, et vient de luy al commencement.* (*M. 24 Edw. III.* 65.)

(3) I do not understand Montesquieu, in the chapter cited, to say that all the allodial lands in France were surrendered up into the king's hands, and taken again as fiefs. Down to a late period, the presumption of law in the southern provinces of France as to land was, that it was allodial, until the contrary was shewn. See Hallam's M. Ages, ch. 2. part 1.

nations who adopted this system were obliged to act upon the same supposition, as a substruction and foundation of their new polity, though the fact was, indeed, far otherwise. And, indeed, by thus consenting to the introduction of feodal tenures, our English ancestors probably meant no more than to put the kingdom in a state of defence by establishing a military system; and to oblige themselves, (in respect of their lands) to maintain the king's title and territories with equal vigour and fealty, *as if* they had received their lands from his bounty upon these express conditions, as pure, proper, beneficiary feudatories. But whatever their meaning was, the Norman intepreters, skilled in all the niceties of the feodal constitutions, and well understanding the import and extent of the feodal terms, gave a very different construction to this proceeding; and thereupon took a handle to introduce not only the rigorous doctrines which prevailed in the duchy of Normandy, but also such fruits and dependencies, such hardships and services, as were never known to other nations[a]; as if the English had, in fact as well as theory, owed every thing they had to the bounty of their sovereign lord.

[52] Our ancestors, therefore, who were by no means beneficiaries, but had barely consented to this fiction of tenure from the crown, as the basis of a military discipline, with reason looked upon these deductions as grievous impositions, and arbitrary conclusions from principles that, as to them, had no foundation in truth[b]. However, this king and his son William Rufus kept up with a high hand all the rigours of the feodal doctrines: but their successor Henry I. found it expedient, when he set up his pretensions to the crown, to promise a restitution of the laws of king Edward the confessor, or antient Saxon system; and accordingly, in the first year of his reign, granted a charter[c], whereby he gave up the greater grievances, but still reserved the fiction of feodal tenure, for the same military purposes which engaged his father to introduce it. But this charter was gradually broken through, and the former grievances were revived and aggravated, by himself and succeeding princes; till in the reign of king John they became so intolerable, that they occasioned

[a] Spelm. of feuds, c. 38. [b] Wright, 81. [c] *LL. Hen. I.* c. 1.

his barons, or principal feudatories, to rise up in arms against him; which at length produced the famous great charter at Runing-mead, which, with some alterations, was confirmed by his son Henry III. And though its immunities (especially as altered on it's last edition by his son [d]) are very greatly short of those granted by Henry I., it was justly esteemed at the time a vast acquisition to English liberty. Indeed by the farther alteration of tenures that has since happened, many of these immunities may now appear, to a common observer, of much less consequence than they really were when granted: but this, properly considered, will shew, not that the acquisitions under John were small, but that those under Charles were greater. And from hence also arises another inference; that the liberties of Englishmen are not (as some arbitrary writers would represent them) mere infringements of the king's prerogative, extorted from our princes by taking advantage of their weakness; but a restoration of that ancient constitution, of which our ancestors had been defrauded by the art and finesse of the Norman lawyers, rather than deprived by the force of the Norman arms.

HAVING given this short history of their rise and progress, [53] we will next consider the nature, doctrine, and principal laws of feuds; wherein we shall evidently trace the groundwork of many parts of our public polity, and also the original of such of our own tenures as were either abolished in the last century, or still remain in force.

THE grand and fundamental maxim of all feodal tenure is this: that all lands were originally granted out by the sovereign, and are therefore holden, either mediately or immediately, of the crown. The grantor was called the proprietor, or *lord*; being he who retained the dominion or ultimate property of the feud or fee: and the grantee, who had only the use and possession, according to the terms of the grant, was styled the feudatory or *vasal* (4), which was only another name

[d] 9 *Hen. III.*

(4) A satisfactory derivation of this word has long been wanting, which is entirely omitted in Spelman's Glossary. Meyer suggests one, which is at least plausible. The word "gesell," he says, in Dutch and German

for the tenant or holder of the lands; though, on account of the prejudices which we have justly conceived against the doctrines that were afterwards *grafted* on this system, we now use the word *vasal* opprobriously, as synonymous to slave or bondman. The manner of the grant was by words of gratuitous and pure donation, *dedi et concessi*; which are still the operative words in our modern infeodations or deeds of feoffment. This was perfected by the ceremony of corporal investiture, or open and notorious delivery of possession in the presence of the other vasals; which perpetuated among them the aera of the new acquisition, at a time when the art of writing was very little known: and, therefore, the evidence of property was reposed in the memory of the neighbourhood; who, in case of a disputed title, were afterwards called upon to decide the difference, not only according to external proofs, adduced by the parties litigant, but also by the internal testimony of their own private knowledge.

Besides an oath of *fealty*, or profession of faith to the lord, which was the parent of our oath of allegiance (5), the vasal or tenant upon investiture did usually *homage* to his lord; openly and humbly kneeling, being ungirt, uncovered, and
[54] holding up his hands both together between those of the lord,

signifies "companion." Tacitus, we know, has described the first rude appearances of the relation of lord and vasal under the notion of companionship; but his terms, *comites* and *comitatus*, were necessarily abandoned for this purpose, when they became applied, which was very early, to designate public officers and public charges, the governors of districts, and the districts themselves. But it is obvious that these must have been secondary meanings, that before *comes* signified a count, or *comitatus* a county, they must have signified companion and companionhood; and we know that the first counts were what we should now call vasals of the monarch. When, however, the secondary meaning superseded the first, it seems not improbable that the original term might be latinized into *guasallus*, or *vasallus*. *Esprit, Origine, et Progres des Institutions Judiciaires*, vol. i. p. 144.

It is dangerous for a person whose knowledge is so superficial as mine to speculate in etymology, and this is not the place to speculate at length on such points; but I seem to see a general relation, confirming Meyer's theory, between *gesell*, and "*ghesind*," family; *gasindus*, a domestic servant; *guastaldus*, *gastaldus*, *guastaldo*, steward, or major domo; *gastaldius*, whose office Spelman likens to that of our sheriff, or *vice-comes*, *alguasil*, and other words of the same family.

(5) See Vol. I. p. 366.

who sate before him; and there professing that "he did become his *man*, from that day forth, of life and limb and earthly honour;" and then he received a kiss from his lord[e]. Which ceremony was denominated *homagium*, or *manhood*, by the feudists, from the stated form of words, *devenio vester homo*[f].

When the tenant had thus professed himself to be the man of his superior or lord, the next consideration was concerning the *service*, which, as such, he was bound to render, in recompense for the land that he held. This, in pure, proper, and original feuds, was only twofold; to follow, or do *suit* to, the lord in his courts in time of peace; and in his armies, or warlike retinue, when necessity called him to the field. The lord was, in early times, the legislator and judge over all his feudatories: and, therefore, the vasals of the inferior lords were bound by their fealty to attend their domestic courts baron[g], (which were instituted in every manor or barony, for doing speedy and effectual justice to all the tenants,) in order as well to answer such complaints as might be alleged against themselves, as to form a jury or homage for the trial of their fellow-tenants: and upon this account, in all the feodal institutions both here and on the continent, they are distinguished by the appellation of the peers of the court; *pares curtis*, or *pares curiae*. In like manner the barons themselves, or lords of inferior districts, were denominated peers of the king's court, and were bound to attend him upon summons, to hear causes of greater consequence in the king's presence, and under the direction of his grand justiciary; till in many countries the power of that officer was broken and distributed into other courts of judicature, the peers of the king's court still reserving to themselves (in almost every feodal government) the right of appeal from [55] those subordinate courts in the last resort. The military

[e] Litt. § 85.

[f] It was an observation of Dr. Arbuthnot, that tradition was no where preserved so pure and incorrupt as among children, whose games and plays are delivered down invariably from one generation to another. (Warburton's notes on Pope, vi. 134. 8°.) It will not, I hope, be thought puerile to remark, in confirmation of this observation, that in one of our antient juvenile pastimes (the *king I am* or *basilinda* of Julius Pollux, *Onomastic*, *l.* 9. *c.* 7.) the ceremonies and language of feodal homage are preserved with great exactness.

[g] *Feud. l.* 2. *t.* 55.

branch of service consisted in attending the lord to the wars, if called upon, with such a retinue, and for such a number of days, as were stipulated at the first donation, in proportion to the quantity of the land.

At the first introduction of feuds, as they were gratuitous, so also they were precarious, and held at the will of the lord[h], who was then the sole judge whether his vasal performed his services faithfully. Then they became certain for one or more *years*. Among the antient Germans they continued only from year to year: an annual distribution of lands being made by their leaders in their general councils or assemblies[i]. This was professedly done, lest their thoughts should be diverted from war to agriculture; lest the strong should encroach upon the possessions of the weak; and lest luxury and avarice should be encouraged by the erection of permanent houses, and too curious an attention to convenience and the elegant superfluities of life. But, when the general migration was pretty well over, and a peaceable possession of the new-acquired settlements had introduced new customs and manners; when the fertility of the soil had encouraged the study of husbandry, and an affection for the spots they had cultivated began naturally to arise in the tillers; a more permanent degree of property was introduced, and feuds began now to be granted for the *life* of the feudatory[k]. But still feuds were not yet *hereditary*; though frequently granted, by the favour of the lord, to the children of the former possessor: till in process of time it became unusual, and was, therefore, thought hard, to reject the heir, if he were capable to perform the services[l]; and therefore infants, women, and professed
[56] monks, who were incapable of bearing arms, were also incapable of succeeding to a genuine feud. But the heir, when admitted to the feud which his ancestor possessed, used generally to pay a fine or acknowledgment to the lord, in horses,

h *Feud. l.* 1. *t.* 1.

i Thus Tacitus: (*de mor. Germ.* c. 26.) "*agri ab universis per vices occupantur; arva per annos mutant.*" And Cæsar yet more fully: (*de bell. Gall.* l. 6. c. 22.) "*Neque quisquam agri modum certum aut fines habet proprios; sed magistratus ac principes, in annos singulos, gentibus cognationibusque hominum qui una coierint, quantum et quo loco visum est, agri attribuunt, atque anno post alio transire cogunt.*"

k *Feud. l.* 1. *t.* 1.

l Wright, 14.

arms, money, and the like, for such renewal of the feud: which was called a relief, because it raised up and re-established the inheritance, or in the words of the feodal writers, "*in-*" *certam et caducam hereditatem relevabat.*" This relief was afterwards, when feuds became absolutely hereditary, continued on the death of the tenant, though the original foundation of it had ceased.

For in process of time feuds became by degrees to be universally extended beyond the life of the first vasal, to his *sons*, or perhaps to such one of them as the lord should name; and in this case the form of the donation was strictly observed: for if a feud was given to a man and his *sons*, all his sons succeeded him in equal portions: and, as they died off, their shares reverted to the lord, and did not descend to their children, or even to the surviving brothers, as not being specified in the donation [m]. But when such a feud was given to a man and his *heirs*, in general terms, then a more extended rule of succession took place; and when the feudatory died, his male descendants *in infinitum* were admitted to the succession. When any such descendant, who thus had succeeded, died, his male descendants were also admitted in the first place; and, in defect of them, such of his male collateral kindred as were of the blood or lineage of the first feudatory, but no others. For this was an unalterable maxim in feodal succession, that "none was capable of inheriting a feud, but "such as was of the blood of, that is, lineally descended "from, the first feudatory [n]." And the descent, being thus confined to males, originally extended to all the males alike; all the sons, without any distinction of primogeniture, succeeding to equal portions of the father's feud. But this being found upon many accounts inconvenient, (particularly by dividing the services, and thereby weakening the strength of the feodal union,) and *honorary* feuds (or titles of nobility) [57] being now introduced, which were not of a divisible nature, but could only be inherited by the eldest son [o]; in imitation of these, *military* feuds (or those we are now describing) began also in most countries to descend, acccording to the same rule of primogeniture, to the eldest son, in exclusion of all the rest [p].

[m] Wright, 17. [n] *Ibid.* 182. [o] *Feud.* 2. *t.* 55. [p] Wright, 82.

Other qualities of feuds were, that the feudatory could not aliene or dispose of his feud; neither could he exchange, nor yet mortgage, nor even devise it by will, without the consent of the lord [q]. For the reason of conferring the feud being the personal abilities of the feudatory to serve in war, it was not fit he should be at liberty to transfer this gift, either from himself, or from his posterity, who were presumed to inherit his valour, to others who might prove less able. (6) And, as the feodal obligation was looked upon as reciprocal, the feudatory being entitled to the lord's protection, in return for his own fealty and service; therefore, the lord could no more transfer his seignory or protection without consent of his vasal, than the vasal could his feud without consent of his lord [r]: it being equally unreasonable, that the lord should extend his protection to a person to whom he had exceptions, and that the vasal should owe subjection to a superior not of his own choosing.

These were the principal, and very simple, qualities of the genuine or original feuds; which were all of a military nature, and in the hands of military persons: though the feudatories, being under frequent incapacities of cultivating and manuring their own lands, soon found it necessary to commit part of them to inferior tenants; obliging them to such returns in service, corn, cattle, or money, as might enable the chief feudatories to attend their military duties without distraction: which returns, or *reditus*, were the original of rents, and by these means the feodal polity was greatly extended; these inferior feudatories (who held what are called in the Scots law "rere-fiefs") being under similar
[58] obligations of fealty, to do suit of court, to answer the stipulated renders or rent-service, and to promote the welfare of their immediate superiors or lords [s]. But this at the same time demolished the antient simplicity of feuds; and an inroad

[q] Wright, 29. [r] *Ibid.* 30. [s] *Ibid.* 20.

(6) When a feud had descended on any one, the restraint on alienation went a step farther, and he was not allowed to alien without the consent of the next collateral heir; for though the law trusted an ancestor with the interest of his own immediate descendants, yet it would not allow him to prejudice the distinct, though remote, interest in the donation which the next collateral heir had. Wright on Tenures, 167.

being once made upon their constitution, it subjected them in a course of time, to great varieties and innovations. Feuds began to be bought and sold, and deviations were made from the old fundamental rules of tenure and succession; which were held no longer sacred, when the feuds themselves no longer continued to be purely military. Hence these tenures began now to be divided into *feoda propria et impropria*, proper and improper feuds; under the former of which divisions were comprehended such, and such only, of which we have before spoken; and under that of improper or derivative feuds were comprized all such as do not fall within the other description; such, for instance, as were originally bartered and sold to the feudatory for a price; such as were held upon base or less honourable services, or upon a rent, in lieu of military service; such as were in themselves alienable, without mutual licence; and such as might descend indifferently either to males or females. But, where a difference was not expressed in the creation, such new created feuds did in all respects follow the nature of an original, genuine, and proper feud [t].

But as soon as the feodal system came to be considered in the light of a civil establishment, rather than as a military plan, the ingenuity of the same ages, which perplexed all theology with the subtilty of scholastic disquisitions, and bewildered philosophy in the mazes of metaphysical jargon, began also to exert its influence on this copious and fruitful subject: in pursuance of which, the most refined and oppressive consequences were drawn from what originally was a plan of simplicity and liberty, equally beneficial to both lord and tenant, and prudently calculated for their mutual protection and defence. From this one foundation, in different countries of Europe, very different superstructures have been raised: what effect it has produced on the landed property of England will appear in the following chapters. (7)

[t] *Feud.* 2. *t.* 7.

(7) Upon the subject of the feudal system, its rise and decline, its spirit, and the comparative evils and benefits of which it was the cause, I cannot do better than refer the reader to Mr. Hallam's masterly disquisition. Mid. Ages, ch. 9. part 2.

CHAPTER THE FIFTH.

OF THE ANTIENT ENGLISH TENURES.

IN this chapter we shall take a short view of the antient tenures of our English estates, or the manner in which lands, tenements, and hereditaments, might have been holden, as the same stood in force, till the middle of the last century. In which we shall easily perceive, that all the particularities, all the seeming and real hardships, that attended those tenures, were to be accounted for upon feodal principles and no other; being fruits of, and deduced from, the feodal policy.

ALMOST all the real property of this kingdom is, by the policy of our laws, supposed to be granted by, dependent upon, and *holden* of, some superior lord, by and in consideration of certain services to be rendered to the lord by the tenant or possessor of this property. The thing holden is therefore stiled a *tenement*, the possessors thereof *tenants*, and the manner of their possession a *tenure*. Thus all the land in the kingdom is supposed to be holden, mediately or immediately, of the king, who is stiled the lord *paramount*, or above all. Such tenants as held under the king immediately, when they granted out portions of their lands to inferior persons, became also lords with respect to those inferior persons, as they were still tenants with respect to the king; and, thus partaking of a middle nature, were called *mesne*, or middle, lords. So that if the king granted a manor to A, and he granted a portion of the land to B, now B was said
[60] to hold of A, and A of the king; or in other words, B held his lands immediately of A, but mediately of the king.

The king therefore was stiled lord paramount; A. was both tenant and lord, or was a mesne lord: and B. was called tenant *paravail*, or the lowest tenant; being he who was supposed to make avail, or profit of the land [a]. In this manner are all the lands of the kingdom holden, which are in the hands of subjects: for, according to Sir Edward Coke [b], in the law of England, we have not properly *allodium*; which, we have seen [c], is the name by which the feudists abroad distinguish such estates of the subject, as are not holden of any superior. So that at the first glance we may observe, that our lands are either plainly feuds, or partake very strongly of the feodal nature.

All tenures being thus derived, or supposed to be derived, from the king, those that held immediately under him, in right of his crown and dignity, were called his tenants *in capite*, or in chief; which was the most honourable species of tenure, but at the same time subjected the tenants to greater and more burthensome services, than inferior tenures did [d]. This distinction ran through all the different sorts of tenure, of which I now proceed to give an account.

I. There seem to have subsisted among our ancestors four principal species of lay tenures, to which all others may be reduced; the grand criteria of which were the natures of the several services or renders, that were due to the lords from their tenants. The services, in respect of their quality, were either *free* or *base* services; in respect of their quantity and the time of exacting them, were either *certain* or *uncertain*. *Free* services were such as were not unbecoming the character of a soldier or a freeman to perform; as to serve under his lord in the wars, to pay a sum of money, and the like. *Base* services were such as were fit only for peasants or persons of a servile rank; as to plough the lord's land, to make his hedges, to carry out his dung, or other mean employments. The *certain* services, whether free or base, were [61]

[a] 2 Inst. 296.

[b] Co. Litt. 1.

[c] page 47.

[d] In the Germanic constitution, the electors, the bishops, the secular princes, the imperial cities, &c. which hold directly from the emperor, are called the *immediate* states of the empire; all other landholders being denominated *mediate* ones. Mod. Un. Hist. xliii. 61.

such as were stinted in quantity, and could not be exceeded on any pretence; as, to pay a stated annual rent, or to plough such a field for three days. The *uncertain* depended upon unknown contingencies; as, to do military service in person, or pay an assessment in lieu of it, when called upon; or to wind a horn whenever the Scots invaded the realm; which are free services: or to do whatever the lord should command; which is a base or villein service.

From the various combinations of these services have arisen the four kinds of lay tenure which subsisted in England till the middle of last century: and three of which subsist to this day. Of these Bracton (who wrote under Henry the third) seems to give the clearest and most compendious account, of any author antient or modern[e]; of which the following is the outline or abstract[f]. "Tenements are of "two kinds, *frank-tenement* and *villenage*. And, of frank-"tenements, some are held freely in consideration of homage "and *knight-service*; others in *free socage* with the service "of fealty only." And again[g], "of villenages some are "pure, and others privileged. He that holds in *pure ville-*"*nage* shall do whatever is commanded him, and always be "bound to an uncertain service. The other kind of vil-"lenage is called *villein-socage*; and these villein socmen do "villein services, but such as are certain and determined." Of which the sense seems to be as follows: first, where the service was *free* but *uncertain*, as military service with homage, that tenure was called the tenure in chivalry, *per ser-*
[62] *vitium militare*, or by knight-service. Secondly, where the service was not only *free* but also *certain*, as by fealty only, by rent and fealty, *&c.* that tenure was called *liberum socagium*, or free socage. These were the only *free* holdings or tenements; the others were *villenous* or servile, as thirdly, where the service was *base* in its nature, and *uncertain* as to time

[e] *l.* 4. *tr.* 1. *c.* 28.

[f] *Tenementorum aliud liberum, aliud villenagium. Item, liberorum aliud tenetur libere pro homagio et servitio militari; aliud in libero socagio cum fidelitate tantum.* § 1.

[g] *Villenagiorum aliud purum, aliud privilegiatum. Qui tenet in puro villenagio faciet quicquid ei praeceptum fuerit, et semper tenebitur ad incerta. Aliud genus villenagii dicitur villanum socagium; et hujusmodi villani socmanni — villana faciunt servitia, sed certa, et determinata,* § 5.

and quantity, the tenure was *purum villenagium*, absolute or pure villenage. Lastly, where the service was *base* in its nature, but reduced to a *certainty*, this was still villenage, but distinguished from the other by the name of privileged villenage, *villenagium privilegiatum*; or it might be still called socage (from the *certainty* of its services), but degraded by their *baseness* into the inferior title of *villanum socagium*, villein-socage. (1)

I. THE first, most universal, and esteemed the most honourable species of tenure, was that by knight-service, called in Latin *servitium militare*; and in Law French, *chivalry*, or *service de chivaler*, answering to the *fief d'haubert* of the Normans [h], which name is expressly given it by the Mirrour [i]. (2) This differed in very few points, as we shall presently see, from a pure and proper feud, being entirely military and the genuine effect of the feodal establishment in England. To make a tenure by knight service, a determinate quantity of land was necessary, which was called a knight's fee, *feodum militare*; the measure of which in 3 Edw. I. was estimated

[h] Spelm. *Gloss.* 219. [i] c. 2. § 27.

(1) The passage on villenage in Bracton is not accurately cited, but so far as regards pure villenage the sense is fairly enough given: as to the other branch the passage stands thus in the original: *Est etiam aliud genus villenagii quod* tenetur de domino Rege à conquestu Angliæ, *quod dicitur Socagium villanum, et quod est villenagium, sed tamen privilegiatum. Habent itaque* tenentes de dominicis Domini Regis *tale privilegium, quod à glebâ amoveri non debent, quamdiu velint et possint facere debitum servitium, et hujusmodi villani sokmanni propriè dicuntur glebæ ascripticii. Villana autem faciunt servitia, sed certa et determinata.* All *villein socmen*, therefore, were originally tenants in antient demesne. See post, p. 98.

(2) Sir M. Wright cites from Loyseau Traité des Seigneuries, 156, 157, the following rational explanation of the fief d'haubert: *Les Seigneurs des Baronnies se sont appellez Hauts Barons, ou hauts Bers, car il est bien certain que Ber et Baron est mesme chose. Et Haut Ber et Haut Baron sont confondus comme synonimes et de là sans doute originairement a estre dit le fief de Hautbert. Mais pour ce que le Haut Ber ou Seigneur de fief de Hautbert estoit tenu servir le Roy en guerre avec armes pleins, et consequemment avec l'arme du corps, qui estoit lors la cotte de Mailles, de là est venu que cest arme a esté appellez Hauber, ou Haubergeon, dont à succession de temps est advenu que le fief de Hauber a esté pris pour toute espèce de fief, dont le seigneur est tenu servir le Roy avec le Hauber, ou Haubergeon.* Wright, 143.

at twelve ploughlands [k], and its value (though it varied with the times [l]) in the reigns of Edward I. and Edward II.[m] was stated at 20*l. per annum.* (3) And he who held this proportion of land (or a whole fee) by knight-service, was bound to attend his lord to the wars for forty days in every year, if called upon [n]; which attendance was his *reditus* or return, his rent or service for the land he claimed to hold. If he held only half a knight's fee, he was only bound to attend
[63] twenty days, and so in proportion [o]. And there is reason to apprehend, that this service was the whole that our ancestors meant to subject themselves to; the other fruits and consequences of this tenure being fraudulently superinduced, as the regular (though unforeseen) appendages of the feodal system.

This tenure of knight-service had all the marks of a strict and regular feud, it was granted by words of pure donation, *dedi et concessi* [p]; was transferred by investiture or delivering corporal possession of the land, usually called livery of seisin; and was perfected by homage and fealty. It also drew after

[k] *Pasch.* 3 Edw. I. Co. Litt. 69.
[l] 2 Inst. 596.
[m] Stat. Westm. 1. c. 36. Stat. *de milit.* 1 Edw. II. Co. Litt. 69.
[n] See writs for this purpose in *Memorand. Scacch.* 36. prefixed to Maynard's year book, Edw. II.
[o] Litt. § 95.
[p] Co. Litt. 9.

(3) Upon the questions of the extent and value of a knight's fee there are many opinions, and it seems hardly possible in the present day to arrive at any certainty. With regard to the value, it varied undoubtedly; but it can hardly be said to have varied "with the times," if the writs, as cited by lord Coke, 2 Inst. 596. can be depended upon. The fluctuation in them is so uncertain and extraordinary, that it cannot be accounted for by any change in the times. With regard to the extent we can have no hesitation in assenting to the doctrine, that it varied with the goodness of the land; at the same time the measure might be the same, as twelve plough-lands of rich soil would contain a less space than the same number in a lighter and less productive soil. There might, therefore, be always the same number of plough-lands, though the number of acres might vary; nor is it at all inconsistent with this, that there might be appendant to the plough land, wood, meadow, and pasture; for the arable land was the principal thing considered in all ancient agriculture; wood, meadow, and pasture, were appendages, furnishing the estovers and botes of the tenant of the arable land.

it these seven fruits and consequences, as inseparably incident to the tenure in chivalry; *viz.* aids, relief, primer seisin, wardship, marriage, fines for alienation, and escheat: all which I shall endeavour to explain, and shew to be of feodal original.

1. AIDS were originally mere benevolences granted by the tenant to his lord, in times of difficulty and distress[q] (4); but in process of time they grew to be considered as a matter of right, and not of discretion. These aids were principally three; first, to ransom the lord's person, if taken prisoner; a necessary consequence of the feodal attachment and fidelity: insomuch that the neglect of doing it, whenever it was in the vasal's power, was by the strict rigour of the feodal law an absolute forfeiture of his estate[r]. Secondly, to make the lord's eldest son [and heir apparent] a knight; a matter that was formerly attended with great ceremony, pomp, and expence. This aid could not be demanded till the heir was fifteen years old, or capable of bearing arms[s]: the intention of it being to breed up the eldest son and heir apparent of the seigniory, to deeds of arms and chivalry, for the better defence of the nation. Thirdly, to marry the lord's eldest daughter, by giving her a suitable portion: for daughters' portions were in those days extremely slender, few lords being able to save much out of their income for this purpose; nor could they [64] acquire money by other means, being wholly conversant in matters of arms; nor, by the nature of their tenure, could they charge their lands with this or any other incumbrances. (5)

[q] *Auxilia fiunt de gratia, et non de jure, — cum dependeant ex gratia tenentium, et non ad voluntatem dominorum.* Bracton, *l.*2. *tr.*1. *c.*16. § 8.

[r] Feud. *l.*2. *t.*24.

[s] 2 Inst. 233.

(4) The passage in Bracton is stronger than appears by the part cited: "*quæ quidem auxilia fiunt de gratiâ et non de jure, et pro necessitate et indigentiâ domini capitalis. Nunquam igitur exigitur auxilium, nisi præcedat necessitas, nec tenetur aliquis ad hujusmodi auxilium præstandum, nisi ex indigentiâ domini sui capitalis, et ex eo quod est liber homo suus.*"

(5) This, by the statute West. 1. c. 36., could not be demanded till she was seven years of age; after having received these aids, there was no remedy to compel the lord to perform the acts for which they were bestowed; but if he died without marrying his daughter, she might by the same statute recover from his executors the amount of the aid.

From bearing their proportion to these aids, no rank or profession was exempted: and therefore even the monasteries, till the time of their dissolution, contributed to the knighting of their founder's male heir (of whom their lands were holden), and the marriage of his female descendants[t]. And one cannot but observe in this particular the great resemblance which the lord and vasal of the feodal law bore to the patron and client of the Roman republic; between whom also there subsisted a mutual fealty, or engagement of defence and protection. For, with regard to the matter of aids, there were three which were usually raised by the client; *viz.* to marry the patron's daughter; to pay his debts; and to redeem his person from captivity[u]. (6)

But besides these antient feodal aids, the tyranny of lords by degrees exacted more and more: as, aids to pay the lord's debts, (probably in imitation of the Romans,) and aids to enable him to pay aids or reliefs to his superior lord; from which last indeed the king's tenants *in capite* were, from the nature of their tenure, excused, as they held immediately of the king, who had no superior. To prevent this abuse, king

[t] Phillip's Life of Pole. I. 223.

[u] *Erat autem haec inter utrosque officiorum vicissitudo — ut clientes ad collocandas senatorum filias de suo conferrent: in aeris alieni dissolutionem gratuitam pecuniam erogarent; et ab hostibus in bello captos redimerent.* Paul. Manutius *de senatu Romano, c.* 1.

(6) "It is easy to find partial resemblances to the feudal system. The relation of patron and client in the Roman republic is not unlike that of lord and vassal in respect of mutual fidelity; but it was not founded upon the tenure of land, nor military service. The veteran soldiers, and, in later times, some barbarian allies of the emperors, received lands upon condition of public defence; but they were bound, not to an individual lord, but to the state. Such a resemblance to fiefs may be found in the zemindaries of Hindostan, and the Timariots of Turkey. The clan of the Highlanders and Irish followed their chieftain into the field; but their tie was that of imagined kindred and respect for birth, not the spontaneous compact of vassalage. Much less can we extend the name of feud, though it is sometimes strangely misapplied, to the polity of Poland and Russia. All the Polish nobles were equal in rights and independent of each other, all who were less than noble, were in servitude. No government can be more opposite to the long gradations and mutual duties of the feudal system." Hallam's M. Ages, ch. 2 part 2.

John's *magna carta*[w] ordained that no aids be taken by the king without consent of parliament, nor in anywise by inferior lords, save only the three antient ones above-mentioned. But this provision was omitted in Henry III.'s charter, and the same oppressions were continued till the 25 Edw. I. when the statute called *confirmatio cartarum* was enacted; which in this respect revived king John's charter, by ordaining that none but the antient aids should be taken. But though the species of aids was thus restrained, yet the quantity of each aid remained arbitrary and uncertain. King John's charter [65] indeed ordered, that all aids taken by inferior lords should be reasonable[x]; and that the aids taken by the king of his tenants *in capite* should be settled by parliament[y]. But they were never completely ascertained and adjusted till the statute Westm. 1. 3 Edw. I. c. 36. which fixed the aids of inferior lords at twenty shillings, or the supposed twentieth part of the annual value of every knight's fee, for making the eldest son a knight, or marrying the eldest daughter: and the same was done with regard to the king's tenants *in capite* by statute 25 Edw. III. c. 11. The other aid, for ransom of the lord's person, being not in its nature capable of any certainty, was therefore never ascertained.

2. RELIEF, *relevium*, was before mentioned as incident to every feodal tenure, by way of fine or composition with the lord for taking up the estate, which was lapsed or fallen in by the death of the last tenant. But though reliefs had their original while feuds were only life-estates, yet they continued after feuds became hereditary; and were therefore looked upon, very justly, as one of the greatest grievances of tenure: especially when, at the first, they were merely arbitrary and at the will of the lord; so that, if he pleased to demand an exorbitant relief, it was in effect to disinherit the heir[z]. The English ill brooked this consequence of their new-adopted policy; and therefore William the conqueror by his laws[a] *ascertained* the relief, by directing (in imitation of the Danish heriots) that a certain quantity of arms, and habiliments of

[w] *cap* 12. 15.
[x] *cap.* 15.
[y] *Ibid.* 14.
[z] Wright, 99.
[a] c. 22, 23, 24

war, should be paid by the earls, barons, and vavasours respectively; and if the latter had no arms, they should pay 100*s*. William Rufus broke through this composition, and again demanded arbitrary uncertain reliefs, as due by the feodal laws: thereby in effect obliging every heir to new-purchase or *redeem* his land [b]: but his brother Henry I., by the charter before mentioned, restored his father's law; and
[66] ordained, that the relief to be paid should be according to the law so established, and not an arbitrary redemption [c]. But afterwards, when, by an ordinance in 27 Hen. II. called the assize of arms, it was provided that every man's armour should descend to his heir, for defence of the realm; and it thereby became impracticable to pay these acknowledgements in arms according to the laws of the conqueror, the composition was universally accepted of 100*s*. for every knight's fee; as we find it ever after established [d]. But it must be remembered, that this relief was only then payable, if the heir at the death of his ancestor had attained his full age of one and twenty years.

3. Primer *seisin* was a feodal burthen, only incident to the king's tenants *in capite*, and not to those who held of inferior or mesne lords. It was a right which the king had, when any of his tenants *in capite* died seised of a knight's fee, to receive of the heir (provided he were of full age) one whole year's profits of the lands, if they were in immediate possession: and half a year's profits, if the lands were in reversion expectant on an estate for life [e]. This seems to be little more than an additional relief, but grounded upon this feodal reason: that by the antient law of feuds, immediately upon the death of a vasal, the superior was entitled to enter and take seisin or possession of the land, by way of protection against intruders, till the heir appeared to claim it, and receive investiture: during which interval the lord was entitled to take the profits; and, unless the heir claimed within a year and day, it was by the strict law a forfeiture [f]. This practice,

[b] 2 Roll. Abr. 514.

[c] "*Haeres non redimet terram suam "sicut faciebat tempore fratris mei, sed "legitima et justa relevatione relevabo "eam.*" (*Text. Roffens. cap.* 34.)

[d] Glanv. *l.* 9. *c.* 4. Litt. § 112.

[e] *Co.* Litt. 77.

[f] *Feud. l.* 2. *t.* 24.

however, seems not to have long obtained in England, if ever, with regard to tenure under inferior lords; but as to the king's tenures *in capite*, the *prima seisina* was expressly declared, under Henry III. and Edward II., to belong to the king by prerogative, in contradistinction to other lords[g]. The king was entitled to enter and receive the whole profits of [67] the land, till livery was sued; which suit being commonly made within a year and day next after the death of the tenant, in pursuance of the strict feodal rule, therefore the king used to take as an average the *first fruits*, that is to say, one year's profits of the land[h]. And this afterwards gave a handle to the popes, who claimed to be feodal lords of the church, to claim in like manner from every clergyman in England the first year's profits of his benefice, by way of *primitiae*, or first fruits.

4. These payments were only due if the heir was of full age; but if he was under the age of twenty-one, being a male, or fourteen, being a female[i], the lord was entitled to the *wardship* of the heir, and was called the guardian in chivalry. This wardship consisted in having the custody of the body and lands of such heir, without any account of the profits, till the age of twenty-one in males, and sixteen in females. For the law supposed the heir-male unable to perform knight-service till twenty-one: but as for the female, she was supposed capable at fourteen to marry, and then her husband might perform the service. The lord therefore had no wardship, if at the death of the ancestor the heir-male was of the full age of twenty-one, or the heir-female of fourteen; yet, if she was then under fourteen, and the lord once had her in ward, he might keep her so till sixteen, by virtue of the statute of Westm. 1. 3 Ed. I. c. 22., the two additional years being given by the legislature for no other reason but merely to benefit the lord[k]. (7)

[g] Stat. Marlb. c. 16. 17 Edw. II. c. 3.
[h] Staundf. Prerog. 12.
[i] Litt. § 103.
[k] *Ibid.*

(7) According to lord Coke, 2 Inst. 204, it is not quite correct to say, that the lord might keep her *in ward* for the two additional years; he had the land by the statute, but the guardianship was at an end. The distinction was not merely a verbal one, for being no longer guardian, he was not liable

This wardship, so far as it related to land, though it was not nor could be part of the law of feuds, so long as they were arbitrary, temporary, or for life only; yet, when they became hereditary, and did consequently often descend upon infants, who by reason of their age could neither perform nor stipulate for the services of the feud, does not seem upon feodal principles to have been unreasonable. For the wardship of the land, or custody of the feud, was retained by the lord, that
[68] he might, out of the profits thereof, provide a fit person to supply the infant's services, till he should be of age to perform them himself. And if we consider the feud in it's original import, as a stipend, fee, or reward for actual service, it could not be thought hard that the lord should withhold the stipend, so long as the service was suspended. Though undoubtedly to our English ancestors, where such a stipendiary donation was a mere supposition or figment, it carried abundance of hardship; and accordingly it was relieved by the charter of Henry I. before mentioned, which took this custody from the lord, and ordained that the custody, both of the land and the children, should belong to the widow or next of kin. But this noble immunity did not continue many years.

The wardship of the body was a consequence of the wardship of the land; for he who enjoyed the infant's estate was the properest person to educate and maintain him in his

---

liable to the actions in respect of the land, which as guardian he must have answered; for example, the widow of the last tenant could not bring her writ of dower against him: on the other hand, he had not all the established rights of a guardian against the heir, and therefore, if he tendered her a marriage during the two years, and she contracted a marriage elsewhere, there lay no forfeiture of the value of the marriage against her.

It is necessary also to make another qualification of the text, for the statute did not apply, if the heir female was married, though under fourteen, the two years being given to the lord ostensibly not so much for his benefit, as that during that time he might find his ward a proper husband; and therefore, if he married her within the two years, he immediately lost the land. 2 Inst. 203. On the other hand, the capability of marriage at fourteen, and the performance of the service by the husband, were not the sole reasons for limiting her wardship to that age; because by law she might marry at twelve; and if she had so done, and her husband were able to perform the service, still the lord would have the wardship of the land till her age of fourteen. Co. Litt. 79.

infancy: and also, in a political view, the lord was most concerned to give his tenant a suitable education, in order to qualify him the better to perform those services which in his maturity he was bound to render.

WHEN the male heir arrived to the age of twenty-one, or the heir female to that of sixteen, they might sue out their livery or *ousterlemain*[k]; that is, the delivery of their lands out of their guardian's hands. For this they were obliged to pay a fine, namely, half a year's profits of the land; though his seems expressly contrary to *magna carta*[l]. However, in consideration of their lands having been so long in ward, they were excused all reliefs, and the king's tenants also all primer seisins[m]. In order to ascertain the profits that arose to the crown by these fruits of tenure, and to grant the heir his livery, the itinerant justices, or justices in eyre, had it formerly in charge to make inquisition concerning them by a jury of the county[n], commonly called an *inquisitio post mortem*; which was instituted to inquire (at the death of any man of fortune) the value of his estate, the tenure by which it was holden, and who, and of what age his heir was; thereby to [69] ascertain the relief and value of the primer seisin, or the wardship and livery accruing to the king thereupon. A manner of proceeding that came, in process of time, to be greatly abused, and at length an intolerable grievance; it being one of the principal accusations against Empson and Dudley, the wicked engines of Henry VII., that by colour of false inquisitions they compelled many persons to sue out livery from the crown, who by no means were tenants thereunto[o]. And afterwards, a court of wards and liveries was erected[p], for conducting the same inquiries in a more solemn and legal manner. (8)

WHEN the heir thus came of full age, provided he held a knight's fee *in capite* under the crown, he was to receive the

[k] Co. Litt. 77.
[l] 9 Hen. III. c. 3.
[m] Co. Litt. 77.
[n] Hoveden, *sub Ric. I.*
[o] 4 Inst. 198.
[p] Stat. 32 Hen. VIII. c. 46.

(8) The 32 H. 8. c. 46. established the court of wards; the liveries were added to that court by the 33 H. 8. c. 22. and then it took the style of the Court of Wards and Liveries.

order of knighthood, and was compellable to take it upon him, or else pay a fine to the king. For in those heroical times, no person was qualified for deeds of arms and chivalry who had not received this order, which was conferred with much preparation and solemnity. We may plainly discover the footsteps of a similar custom in what Tacitus relates of the Germans, who, in order to qualify their young men to bear arms, presented them, in a full assembly, with a shield and lance; which ceremony, as was formerly hinted [q], is supposed to have been the original of the feodal knighthood[r]. This prerogative, of compelling the king's vasals to be knighted, or to pay a fine, was expressly recognized in parliament by the statute *de militibus*, 1 Edw. II.; was exerted as an expedient for raising money by many of our best princes, particularly by Edward VI. and queen Elizabeth; but yet was the occasion of heavy murmurs when exerted by Charles I.: among whose many misfortunes it was, that neither himself nor his people seemed able to distinguish between the arbitrary stretch, and the legal exertion of prerogative. However,
[70] among the other concessions made by that unhappy prince, before the fatal recourse to arms, he agreed to divest himself of this undoubted flower of the crown, and it was accordingly abolished by statute 16 Car. I. c. 20. (9)

5. But, before they came of age, there was still another piece of authority, which the guardian was at liberty to exercise over his infant wards; I mean the right of *marriage*, (*maritagium*, as contradistinguished from *matrimony*,) which in it's feodal sense signifies the power, which the lord or guardian in chivalry had, of disposing of his infant ward in matrimony. For, while the infant was in ward, the guardian had the power of tendering him or her a suitable match, without *disparagement* or inequality: which if the infants refused, they forfeited the value of the marriage, *valorem maritagii*, to their guardian[s]; that is, so much as a jury would

[q] Vol. I. page 404.

[r] "*In ipso concilio vel principum aliquis, vel pater, vel propinquus, scuto framcâque juvenem ornant. Haec apud illos toga, hic primus juventae honos: ante hoc domûs pars videntur; mox reipublicae.*" *De Mor. Germ. cap.* 13.

[s] Litt. § 110.

(9) See Vol. I. p. 404.

assess, or any one would *bona fide* give to the guardian for such an alliance[t]: and, if the infants married themselves without the guardian's consent, they forfeited double the value, *duplicem valorem maritagii*[u]. This seems to have been one of the greatest hardships of our antient tenures. There were indeed substantial reasons why the lord should have the *restraint* and *control* of the ward's marriage, especially of his female ward; because of their tender years, and the danger of such female ward's intermarrying with the lord's enemy[w]: but no tolerable pretence could be assigned why the lord should have the *sale* or *value* of the marriage. Nor indeed is this claim of strictly feodal original; the most probable account of it seeming to be this: that by the custom of Normandy the lord's consent was necessary to the marriage of his *female* wards[x]; which was introduced into England, together with the rest of the Norman doctrine of feuds: and it is likely that the lords usually took money for such their consent, since, in the often-cited charter of Henry the first, he engages for the future to take nothing for *his* consent; which also he promises in general to give, provided such female ward were not married to his enemy. But this, among [71] other beneficial parts of that charter, being disregarded, and guardians still continuing to dispose of their wards in a very arbitrary unequal manner, it was provided by king John's great charter, that heirs should be married without disparagement, the next of kin having previous notice of the contract[y]; or, as it was expressed in the first draught of that charter, *ita maritentur ne disparagentur, et per consilium propinquorum de consanguinitate sua*[z]. But these provisions in behalf of the relations were omitted in the charter of Henry III.: wherein[a] the clause stands merely thus, "*haeredes maritentur absque* "*disparagatione:*" meaning certainly, by *haeredes*, heirs female, as there are no traces before this to be found of the lord's claiming the marriage[b] of heirs male; and as Glanvil[c] expressly confines it to heirs female. But the king and his great lords thenceforward took a handle (from the ambiguity

[t] Stat. Mert. c. 6. Co. Litt. 82.
[u] Litt. § 110.
[w] Bract. *l.* 2. *c.* 37. § 6.
[x] Gr. Coust. 95.
[y] *cap.* 6. *edit. Oxon.*
[z] *cap.* 3. *ibid.*
[a] *cap.* 6.
[b] The words *maritare* and *maritagium* seem *ex vi termini* to denote the providing of an *husband*.
[c] *l.* 7. *c.* 9 & 12. & *l.* 9. *c* 4.

of this expression) to claim them both, *sive sit masculus sive foemina*, as Bracton more than once expresses it[d]: and also as nothing but disparagement was restrained by *magna carta*, they thought themselves at liberty to make all other advantages that they could[e] And afterwards this right of selling the ward in marriage, or else receiving the price or value of it, was expressly declared by the statute of Merton[f]; which is the first direct mention of it that I have met with, in our own or any other law. (10)

[d] *l.* 2. *c.* 38. § 1. [e] Wright, 97. [f] 20 Hen. III. c. 6.

(10) Upon this subject once so important the law may, perhaps, be stated more correctly as follows: 1st. As to heirs male under fourteen: if such heir married without the consent of the lord, the common law gave him a remedy by action of trespass for damages against the abducer, and for the single value of the marriage against the heir, upon his coming of age. To these, the statute of Merton added a remedy against the abducer for the single value of the marriage, with fine to the king, and imprisonment till both fine and the value were paid. 2d. As to heirs female under fourteen: If they married without his consent, the guardian had, against them and their abducers, the same common-law remedies as have been just mentioned; but not those of the statute of Merton, which did not extend to females. If they married with his consent, of course he secured to himself the value of the marriage, and lost the lands. 3d. As to heirs male above fourteen: The guardian was, at all events, entitled to the single value of the marriage, whether the ward married, or he had tendered a suitable marriage or not. In case of a tender and refusal, and no marriage elsewhere, he had the single value; and in case of a tender (which necessary qualification the text omits) and refusal, and marriage elsewhere, he had the double value, which he secured by detaining the land beyond the age of twenty-one, and receiving the profits till he had made double the sum which a jury should assess as the fair single value, or which he could prove had been offered to him for the marriage. And into this predicament he might bring those who had been taken away and married under fourteen, within the age of consent, because they might, by disagreeing after fourteen, avoid their marriages; and therefore, they incurred the forfeiture by refusing so to do, and to contract a reasonable marriage tendered to them by him. 4th. As to females above fourteen: The statute of Merton not applying to them, their marriage against his will involved no forfeiture, but by st. Westm. 1. c. 23. the lord might, if they refused a reasonable marriage, hold the lands till their age of 21; and beyond that time till he had levied the value of the marriage.

Sec. 2. Inst. 90—92. ib. 202. 204., 5 Rep. 126., 6 Rep. 70., Co. Litt. 82.

All the provisions mentioned in this note apply, it will be observed, to infant heirs left by their ancestors unmarried; but according to Glanville, and the

6. ANOTHER attendant or consequence of tenure by knight-service was that of *fines* due to the lord for every *alienation*, whenever the tenant had occasion to make over his land to another. This depended on the nature of the feodal connection; it not being reasonable nor allowed, as we have before seen, that a feudatory should transfer his lord's gift to another, and substitute a new tenant to do the service in his own stead, without the consent of the lord: and as the feodal obligation was considered as reciprocal, the lord also could [72] not alienate his seignory without the consent of his tenant, which consent of his was called an *attornment*. (11) This restraint upon the lords soon wore away; that upon the tenants continued longer. For when every thing came in process of time to be bought and sold, the lords would not grant a licence to their tenant, to aliene, without a fine being paid; apprehending that, if it was reasonable for the heir to pay a fine or relief on the renovation of his paternal estate, it was much more reasonable that a stranger should make the same acknowledgment on his admission to a newly purchased feud. With us in England, these fines seem only to have been exacted from the king's tenants *in capite*, who were never able to aliene without a licence: but as to common persons, they were at liberty, by *magna carta* [g], and the statute of *quia emtores* [h], (if not earlier,) to aliene the whole of their estate, to be holden of the same lord as they themselves held it of before. But the king's tenants *in capite*, not being included under the general words of these statutes, could not aliene without a licence: for if they did, it was in ancient strictness an absolute forfeiture of the land [i]; though some have ima-

[g] *cap.* 32. [h] 18 Edw. I. c. 1. [i] 2 Inst. 66.

the charter of Henry the first, as applicable to the king's tenants, even the parents of daughters, who were to be his heirs, could not in his life time marry them without the licence of the lord. L. vii. c. 12. and Bracton lays down the law to the same effect with regard to heiresses, who should come to their inheritance when of full age; in this case, though of course there was no wardship, they could not marry without the assent of their lords. L. ii. c. 38. s. 1. Both these restrictions, however, seem to be quite independent of the value of the marriage, and to have been grounded on the reasonable feudal polity, that the Lord should be secure from the ward's intermarrying with his enemy.

(11) For attornment, see post, 290.

gined otherwise. But this severity was mitigated by the statute 1 Edw. III. c. 12. which ordained, that in such case the lands should not be forfeited, but a reasonable fine be paid to the king. Upon which statute it was settled, that one third of the yearly value should be paid for a licence of alienation; but if the tenant presumed to aliene without a licence, a full year's value should be paid [k]. (12)

[k] 2 Inst. 67.

(12) This is not quite correctly stated: the chapter of magna carta was made in restraint of a practice which tenants had got into of aliening a part or the whole of their fees *to hold of themselves:* and it enacts, that for the future no man shall aliene more of his *land* than that of the residue, the services due to the lord for the whole *fee* may be sufficiently answered. The construction of this was, (see sir M. Wright, p. 157.) that the part allowed to be alienod was to be holden of the alienor, and not of the lord; indeed, upon feudal principles, the services of the feoffee naturally resulted to his feoffor; the tenure was of him, and there were good feudal reasons for not violating those principles; so long as the part aliened was held of the alienor, no new tenant was obtruded on the lord; and as the lord's seignory was originally reserved over the whole land, he might still distrein over the whole, or in any part, though aliened, for the whole undivided services. While the feudal system was more strictly regarded with reference to its proper objects, these advantages counterbalanced the disadvantages in respect of pecuniary fruits, which flowed from the practice of subinfeudation, but which in their turn, as the system grew more lax, prevailed, and gave occasion to the statute of *Quia emtores.* The policy of this statute was contrary to that of the chapter of magna carta above cited; it was found, (see post, p. 91.) that the process of alienation with the tenure reserved to the alienor, very sensibly diminished the value of the lord's escheat, marriage, and wardship; because they operated beneficially to him, only on the portion of land reserved, and not on that granted out, while the alienor derived all those fruits as they arose from the portion so granted out. It was then thought by the lords better to submit to the inconvenience of new tenants being obtruded on them without their consent, which was grown to be imaginary only, than for the sake of retaining a nominal tenant, to lose the substantial fruits of the tenure. It was now too late to restrain alienation entirely, and therefore the only course which remained was that adopted, to permit it in whole or in part, with a reservation only of the tenure to the next immediate lord, (2 Inst. 501.) by the same services and customs by which it had been before held by the alienor.

With respect to the question of forfeiture, it is curious that lord Coke should be cited apparently in support of the opinion, that alienation by the tenants *in capite* without licence, involved a forfeiture; for at 2 Inst. 66., stating both opinions, he declares his own to be in the negative: and as sir

7. THE last consequence of tenure in chivalry was *escheat*; which is the determination of the tenure, or dissolution of the mutual bond between the lord and tenant from the extinction of the blood of the latter by either natural or civil means: if he died without heirs of his blood, or if his blood was corrupted and stained by commission of treason or felony; whereby every inheritable quality was entirely blotted out and abolished. In such cases the lands escheated, or fell back [73] to the lord of the fee[1]; that is, the tenure was determined by breach of the original condition expressed or implied in the feodal donation. In the one case, there were no heirs subsisting of the blood of the first feudatory or purchaser, to which heirs alone the grant of the feud extended; in the other, the tenant, by perpetrating an atrocious crime, shewed that he was no longer to be trusted as a vasal, having forgotten his duty as a subject: and therefore forfeited his feud, which he held under the implied condition that he should not be a traitor or a felon. The consequence of which in both cases was, that the gift, being determined, resulted back to the lord who gave it[m]. (10)

THESE were the principal qualities, fruits, and consequences of the tenure by knight-service: a tenure, by which the greatest part of the lands in this kingdom were holden, and that principally of the king *in capite*, till the middle of the last century, and which was created, as sir Edward Coke ex-

[1] Co. Litt. 13. [m] *Feud. l. 2. t. 86.*

sir M. Wright thinks, p. 154., erroneously. This gives me occasion to say, that it is of the utmost importance in discussing any point relating to the feudal system, to determine the *time* which is spoken of; thus, according to feudal principles, and *while* those principles were *strictly* maintained, alienation without licence must have involved forfeiture; for the tenant of course could not have compelled the lord to receive the homage and fealty of a new tenant, and by his own act he had renounced his own holding. But it is obvious that there was always a struggle in the advancing spirit of the age to loosen the bonds of feudal tenure, and it may not be possible to fix the period at which the *practice* of alienation became too strong for the law; and being first winked at, was finally legalized.

Under the statute 1 E. 3. c. 12. the fines in both cases were to be paid by the alienee.

(10) See post, p. 245. 246., where the principle of escheats is simplified, and both kinds resolved into the *defectus sanguinis*.

pressly testifies [n], for a military purpose, *viz.* for defence of the realm by the king's own principal subjects, which was judged to be much better than to trust to hirelings or foreigners. The description here given is that of knight-service proper; which was to attend the king in his wars. There were also some other species of knight-service; so called, though improperly, because the service or render was of a free and honourable nature, and equally uncertain as to the time of rendering as that of knight-service proper, and because they were attended with similar fruits and consequences. Such was the tenure by *grand serjeanty per magnum servitium*, whereby the tenant was bound, instead of serving the king *generally* in his wars, to do some special honorary service to the king in person (11): as to carry his banner, his sword, or the like; or to be his butler, champion, or other officer at his coronation [o]. It was in most other respects like knight-service [p]; only he was not bound to pay aid [q], or escuage [r]; [74] and, when tenant by knight service paid five pounds for a relief on every knight's fee, tenant by grand serjeanty paid one year's value of his land, were it much or little [s]. Tenure by *cornage*, which was to wind a horn when the Scots or other enemies entered the land, in order to warn the king's subjects, was (like other services of the same nature,) a species of grand serjeanty [t]. (12)

[n] 4 Inst. 192.
[o] Litt. § 153.
[p] *Ibid.* § 158.
[q] 2 Inst. 233.
[r] Litt. § 158.
[s] *Ibid.* § 154.
[t] *Ibid.* § 156.

(11) Perhaps, more correctly, "to do some special honorary service in person to the king;" the general rule being that it was to be done personally by the tenant if able, though there are many instances in which it was not to be done to the king in person. This may explain why he who held by grand serjeanty paid no escuage. The devout attachment to the lord's person, which was so much fostered by the feudal system, is in none of its minor consequences more conspicuous, than in the nature of the personal services which the haughtiest barons were proud to render to their lord paramount. To be the king's butler or carver, are familiar instances. Mr. Madox mentions one more singular, of a tenure in grand serjeanty by the service of holding the king's head in the ship which carried him in his passage between Dover and Whitsand. Baronia, 5. c. 5.

(12) Tenure by cornage might or might not be grand serjeanty; if the tenant held of the king *in capite*, it was; but if he held of a common person, it was knight's service. Litt. § 156.

THESE services, both of chivalry and grand serjeanty, were all personal, and uncertain as to their quantity or duration. But, the personal attendance in knight-service growing troublesome and inconvenient in many respects, the tenants found means of compounding for it; by first sending others in their stead, and in process of time making a pecuniary satisfaction to the lords in lieu of it. This pecuniary satisfaction at last came to be levied by assessments, at so much for every knight's fee; and therefore this kind of tenure was called *scutagium* in Latin, or *servitium scuti*; *scutum* being then a well-known denomination for money: and, in like manner, it was called, in our Norman French, *escuage*; being indeed a pecuniary, instead of a military, service. The first time this appears to have been taken was in the 5 Hen. II., on account of his expedition to Toulouse; but it soon came to be so universal, that personal attendance fell quite into disuse. Hence we find in our ancient histories, that, from this period, when our kings went to war, they levied scutages on their tenants, that is, on all the landholders of the kingdom, to defray their expenses, and to hire troops; and these assessments in the time of Hen. II., seem to have been made arbitrarily, and at the king's pleasure. Which prerogative being greatly abused by his successors, it became matter of national clamour; and king John was obliged to consent by his *magna carta*, that no scutage should be imposed without consent of parliament[u]. But this clause was omitted in his son Henry III.'s charter, where we only find[w] that scutages or escuage should be taken as they were used to be taken in [75] the time of Henry II.; that is, in a reasonable and moderate manner. Yet afterwards by statute 25 Edw. I. c. 5, & 6., and many subsequent statutes[x], it was again provided, that the king should take no aids or tasks but by the common assent of the realm: hence it was held in our old books, that escuage or scutage could not be levied but by consent of parliament[y]; such scutages being indeed the groundwork of all succeeding subsidies, and the land-tax of later times.

[u] *Nullum scutagium ponatur in regno nostro, nisi per commune consilium regni nostri. cap.* 12.

[w] *cap.* 37.

[x] See Vol. I. pag. 140.

[y] Old Ten *tit. Escuage.*

Since therefore escuage differed from knight-service in nothing, but as a compensation differs from actual service, knight-service is frequently confounded with it. And thus Littleton [s] must be understood, when he tell us, that tenant by homage, fealty, and escuage, was tenant by knight-service: that is, that this tenure (being subservient to the military policy of the nation) was respected [a] as a tenure in chivalry [b]. But as the actual service was uncertain, and depended upon emergencies, so it was necessary that this pecuniary compensation should be equally uncertain, and depend on the assessments of the legislature suited to those emergencies. For had the escuage been a settled invariable sum, payable at certain times, it had been neither more nor less than a mere pecuniary rent: and the tenure, instead of knight-service, would have been of another kind, called socage [c], of which we shall speak in the next chapter. (13)

[s] § 103.
[a] Wright, 122.
[b] *Pro feodo militari reputatur.* Flet. l. 2. c. 14. § 7.
[c] Litt. § 97. 120.

(13) The author, though he refers to sir M. Wright, and in part adopts his language, differs from him materially in his account of escuage, stating it to have been merely a commutation for actual service. Sir M. Wright's theory is founded on good authority, and has the merit of clearing up the confusion in Littleton and the old writers on the distinction between tenure by knight-service and escuage. He considers the word to have a two-fold meaning; to have been, 1st. a service: 2d. in process of time also, a commutation for service. He says that it was a *pecuniary* aid or contribution *reserved* by particular lords in lieu of the common reservation of personal service; the *amount* was seldom fixed by the reservation, because it being intended to supply funds for the extraordinary expence which the lords incurred in personal attendance on the king in war, it would necessarily depend on the quality and quantity of that attendance, which was in itself occasional and uncertain. As this service was so subservient to the military policy of the kingdom, it is not surprising that in the words of Fleta, tenancy by escuage, *pro feodo militari reputabatur.* But, secondly, he admits that it was more generally understood as a mulct or fine for a military tenant's defect of service. And while it was strictly confined to that, there was nothing surprising or unjust in its being arbitrary in amount, because the tenant had incurred a forfeiture, and was at his lord's mercy. When, however, escuage was levied *before* the service, and so the option of performing it in person taken away from the tenant, it is obvious that the case was altered; and then, it seems to have been, at least as soon after as allowed time for the grievance to be generally felt, that

For the present I have only to observe, that by the degenerating of knight-service, or personal military duty, into escuage or pecuniary assessments, all the advantages (either promised or real) of the feodal constitution were destroyed, and nothing but the hardships remained. Instead of forming a national militia composed of barons, knights, and gentlemen, bound by their interest, their honour, and their oaths, to defend their king and country, the whole of this system of tenures now tended to nothing else but a wretched mean [76] of raising money to pay an army of occasional mercenaries. In the mean time, the families of all our nobility and gentry groaned under the intolerable burthens, which (in consequence of the fiction adopted after the conquest) were introduced and laid upon them by the subtlety and finesse of the Norman lawyers. For, besides the scutages to which they were liable in defect of personal attendance, which however were assessed by themselves in parliament, they might be called upon by the king or lord paramount for *aids*, whenever his eldest son was to be knighted, or his eldest daughter married; not to forget the ransom of his own person. The heir, on the death of his ancestor, if of full age, was plundered of the first emoluments arising from his inheritance, by way of *relief* and *primer scisin*; and if under age, of the whole of his estate during infancy. And then, as sir Thomas Smith [d] very feelingly complains, "when he came to his own, "after he was out of *wardship*, his woods decayed, houses "fallen down, stock wasted and gone, lands let forth and "ploughed to be barren," to reduce him still farther, he was yet to pay half a year's profits as a fine for suing out his *livery*; and also the price or value of his marriage, if he

[d] Commonw. l. 3. c. 3.

---

that the barons interfered, and the matter was settled by king John's magna carta.

Escuage may also be considered, in a third point of view, as that sum which, by agreement between the mesne lords and their tenants, was to be paid by the latter to the former, whenever the parliament granted escuage to the king from his tenants. If only the proportion was settled which that sum was to bear to the parliamentary assessment, the amount was still uncertain, and then it remained in the nature of a tenure in chivalry; if the amount was settled, then it became analogous to a socage tenure. Litt. s. 98. 120. Wright, 121. 134.

refused such wife as his lord and guardian had bartered for, and imposed upon him: or twice that value if he married another woman. Add to this, the untimely and expensive honour of *knighthood*, to make his poverty more completely splendid. And when by these deductions his fortune was so shattered and ruined, that perhaps he was obliged to sell his patrimony, he had not even that poor privilege allowed him without paying an exorbitant fine for a *licence* of *alienation*.(14)

A SLAVERY so complicated, and so extensive as this, called aloud for a remedy in a nation that boasted of its freedom. Palliatives were from time to time applied by successive acts of parliament, which assuaged some temporary grievances. Till at length the humanity of king James I. consented [e], in consideration of a proper equivalent, to abolish them all; [77] though the plan proceeded not in effect; in like manner as he had formed a scheme, and begun to put it in execution, for removing the feodal grievance of heritable jurisdictions in Scotland [f], which has since been pursued and effected by the statute 20 Geo. II. c. 43. [g] King James's plan for exchanging our military tenures seems to have been nearly the same as that which has been since pursued; only with this difference, that, by way of compensation for the loss which the crown, and other lords would sustain, an annual fee-farm rent was to have been settled and inseparably annexed to the crown, and assured to the inferior lords, payable out of every knight's fee within their respective seignories. An expedient seemingly much better than the hereditary excise, which was afterwards made the principal equivalent for these concessions. For at length the military tenures, with all their heavy appendages (having during the usurpation been discontinued) were destroyed at one blow by the statute 12 Car. II. c. 24. which enacts, "that the court of wards and liveries, and all

[e] 4 Inst. 202.

[f] Dalrymp. of Feuds, 292.

[g] By another statute of the same year (20 Geo. II. c. 50.) the tenure of *wardholding* (equivalent to the knight-service of England) is for ever abolished in Scotland.

(14) The licence was to be paid for by the alienee, see p. 72. (n. 9.) that is, he was liable for it; but of course it formed part of the purchase-money of the land.

"wardships, liveries, primer seisins, and ousterlemains, "values and forfeitures of marriages, by reason of any tenure "of the king or others, be totally taken away. And that all "fines for alienation, tenures by homage, knight-service, and "escuage, and also aids for marrying the daughter or "knighting the son, and all tenures of the king *in capite*, be "likewise taken away. And that all sorts of tenures, held "of the king or others, be turned into free and common "socage; save only tenures in frankalmoign, copyholds, and "the honorary services (without the slavish part) of grand "serjeanty." A statute, which was a greater acquisition to the civil property of this kingdom than even *magna carta* itself: since that only pruned the luxuriances that had grown out of the military tenures, and thereby preserved them in vigour; but the statute of king Charles extirpated the whole, and demolished both root and branches.

CHAPTER THE SIXTH.

OF THE MODERN ENGLISH TENURES.

ALTHOUGH, by the means that were mentioned in the preceding chapter, the oppressive or military part of the feodal constitution was happily done away, yet we are not to imagine that the constitution itself was utterly laid aside, and a new one introduced in its room: since by the statute 12 Car. II. the tenures of socage and frankalmoign, the honorary services of grand serjeanty, and the tenure by copy of court roll, were reserved; nay, all tenures in general, except frankalmoign, grand serjeanty (1), and copyhold, were reduced to one general species of tenure, then well known, and subsisting, called free and common socage. And this, being sprung from the same feodal original as the rest, demonstrates the necessity of fully contemplating that antient system; since it is that alone to which we can recur to explain any seeming or real difficulties, that may arise in our present mode of tenure.

THE military tenure, or that by knight-service, consisted of what were reputed the most free and honourable services, but which in their nature were unavoidably uncertain in respect to the time of their performance. The second species of tenure, or *free socage*, consisted also of free and honourable

(1) Grand serjeanty, I imagine, ought not to be excepted; for the statute only saves its honorary services, and unless the tenure itself be turned into common socage, those who hold by it can still only devise two-thirds of their lands, &c. so held. See post, 375.

services; but such as were liquidated and reduced to an absolute certainty. And this tenure not only subsists to this day, but has in a manner absorbed and swallowed up (since the statute of Charles the second) almost every other species of [79] tenure. And to this we are next to proceed.

II. SOCAGE, in it's most general and extensive signification, seems to denote a tenure by any certain and determinate service. And in this sense it is by our antient writers constantly put in opposition to chivalry, or knight-service, where the render was precarious and uncertain. Thus Bracton [a]; if a man holds by rent in money, without any escuage or serjeanty, "*id tenementum dici potest socagium*;" but if you add thereto any royal service, or escuage, to any, the smallest, amount, "*illud dici poterit feodum militare*." So too the author of Fleta [b]; "*ex donationibus, servitia militaria vel magnae serjantiae non continentibus, oritur nobis quoddam nomen generale, quod est socagium*." Littleton also [c] defines it to be, where the tenant holds his tenement of the lord by any *certain* service, in lieu of all other services; so that they be not services of chivalry, or knight-service. And therefore afterwards [d] he tells us, that whatsoever is not tenure in chivalry is tenure in socage: in like manner as it is defined by Finch [e], a tenure to be done out of war. The service must therefore be certain, in order to denominate it socage; as to hold by fealty and 20*s*. rent; or by homage, fealty, and 20*s*. rent: or, by homage and fealty without rent: or, by fealty and certain corporal service, as ploughing the lord's land for three days: or, by fealty only without any other service: for all these are tenures in socage [f].

BUT socage, as was hinted in the last chapter, is of two sorts: *free*-socage, where the services are not only certain, but honourable: and *villein*-socage, where the services, though certain, are of a baser nature. Such as hold by the former tenure, are called in Glanvil [g], and other subsequent authors, by the name of *liberi sokemanni*, or tenants in free-socage.

[a] *l.* 2. *c.* 16. § 9.
[b] *l.* 3. *c.* 14. § 9.
[c] § 117.
[d] § 118.
[e] L. 147.
[f] Litt. § 117, 118, 119.
[g] *l.* 3. *c.* 7.

Of this tenure we are first to speak; and this, both in the
[80] nature of it's service, and the fruits and consequences appertaining thereto, was always by much the most free and independent species of any. And therefore I cannot but assent to Mr. Somner's etymology of the word[h]; who derives it from the Saxon appellation *soc*, which signifies liberty or privilege and, being joined to a usual termination, is called *socage*, in Latin *socagium*; signifying thereby a free or privileged tenure.[i] This etymology seems to be much more just than that of our common lawyers in general, who derive it from *soca*, an old Latin word, denoting (as they tell us) a plough: for that in ancient time this socage tenure consisted in nothing else but services of husbandry, which the tenant was bound to do to his lord, as to plough, sow, or reap for him; but that in process of time this service was changed into an annual rent by consent of all parties, and that, in memory of it's original, it still retains the name of socage or plough-service[k]. But this by no means agrees with what Littleton himself tells us[l], that to hold by fealty only, without paying any rent, is tenure in socage; for here is plainly no commutation for plough-service. Besides, even services, confessedly of a military nature and original, (as escuage, which, while it remained uncertain, was equivalent to knight-service,) the instant they were reduced to a certainty, changed both their name and nature, and were called socage[m]. It was the *certainty* therefore that denominated it a socage tenure; and nothing sure could be a greater liberty or privilege, than to have the service ascertained, and not left to the arbitrary calls of the lord, as in the tenures of chivalry. Wherefore also Britton, who describes lands in socage tenure under the name of *fraunke ferme*[n], tells us, that they are "lands and tene-
"ments, whereof the nature of the fee is changed by feoff-
"ment *out of chivalry for certain* yearly services, and in
"respect whereof neither homage, ward, marriage, nor relief
"can be demanded." Which leads us also to another ob-
[81] servation, that if socage tenures were of such base and servile original, it is hard to account for the very great immunities

[h] Gavelk. 138.

[i] In like manner Skene, in his exposition of the Scots' law, title *socage*, tells us, that it is 'any kind of holding of lands quhen ony man is infeft 'freely, &c.'

[k] Litt. § 119.

[l] § 118.

[m] § 98. 120.

[n] c. 66.

which the tenants of them always enjoyed; so highly superior to those of the tenants by chivalry, that it was thought, in the reigns of both Edward I. and Charles II. a point of the utmost importance and value to the tenants, to reduce the tenure by knight-service, to *fraunke ferme* or tenure by socage. We may therefore, I think, fairly conclude in favour of Somner's etymology, and the liberal extraction of the tenure in free socage, against the authority even of Littleton himself. (2)

TAKING this then to be the meaning of the word, it seems probable that the socage tenures were the relics of Saxon liberty; retained by such persons as had neither forfeited them to the king, nor been obliged to exchange their tenure, for the more honourable, as it was called, but, at the same time, more burthensome, tenure of knight-service. This is peculiarly remarkable in the tenure which prevails in Kent, called gavelkind, which is generally acknowledged to be a species of socage tenure[o]; the preservation whereof inviolate from the innovations of the Norman conqueror is a fact universally known. And those who thus preserved their liberties were said to hold in *free* and *common* socage.

[o] Wright, 211.

(2) Sir Martin Wright holds to the etymology of Littleton; 1st, because if socage be understood in the sense of *servitium socæ*, our division of tenures into knight-service and socage will answer directly to the Norman division into *fiefs de Haubert*, and *fiefs de Roturiere*, husbandman's or ploughman's fee; and, 2dly, because in this sense both tenants are simply denominated from the name or nature of the services *anciently* reserved upon them, p. 143. In the words of Mr. Hargrave, both derivations have their share of probability, which is as much as can be expected in a subject so very uncertain. Co. Litt. 86. a. n. (1).

The author a little favourably mistates Mr. Somner's etymology when he speaks of *soc* being "joined to a usual termination," for Mr. Somner makes *agium* a word signifying the agenda or things to be done; according to a common error of etymologists in that and former periods, who thought it necessary to find some distinct independent meaning for every syllable of a word; instead of considering that the terminations of derivative words are the modes only by which different languages, according to different analogies, express the different points of view under which the primitive and substantive idea is to be regarded.

As therefore the grand criterion and distinguishing mark of this species of tenure are the having it's renders or services ascertained, it will include under it all other methods of holding free lands by certain and invariable rents and duties: and, in particular, *petit serjeanty*, tenure in *burgage*, and *gavelkind*.

We may remember that by the statute 12 Car. II. grand serjeanty is not itself totally abolished, but only the slavish appendages belonging to it: for the honorary services (such as carrying the king's sword or banner, officiating as his butler, carver, &c. at the coronation) are still reserved. Now *petit serjeanty* bears a great resemblance to grand serjeanty; for as the one is a personal service, so the other is a rent or render, both tending to some purpose relative to the king's
[82] person. Petit serjeanty, as defined by Littleton [p], consists in holding lands of the king by the service of rendering to him annually some small implement of war, as a bow, a sword, a lance, an arrow, or the like. This, he says [q], is but socage in effect: for it is no personal service, but a certain rent: and, we may add, it is clearly no predial service, or service of the plough, but in all respects *liberum et commune socagium*: only being held of the king, it is by way of eminence dignified with the title of *parvum servitium regis*, or petit serjeanty. And *magna carta* respected it in this light, when it enacted [r], that no wardship of the lands or body should be claimed by the king in virtue of a tenure by petit serjeanty. (3)

[p] § 159. [q] § 160. [r] *cap.* 27.

(3) The expression in Magna Carta is, "we will not have wardship of the heir or of any land which he holds of any other person by knight-service, by reason of any petit serjeanty which he holds of us." But this in effect proves the position of the text, for if petit serjeanty had been a tenure by knight-service, then the prerogative of the crown would have drawn to the king the wardship of all other lands held of other lords, along with the wardship of the land so held of him *in capite*. Co. Litt. 77. a. Petit serjeanty being a tenure *in capite* is affected by the 12 Ch. 2. though not named by it; for livery and *primer seisin* were incident to it, which are expressly taken away by the statute. In other respects, it continues as a dignified branch of the tenure by socage. Co. Litt. 108. b. n. (1). Hargrave's notes.

TENURE in *burgage* is described by Glanvil[s], and is expressly said by Littleton[t], to be but tenure in socage: and it is where the king or other person is lord of an antient borough, in which the tenements are held by a rent certain[u]. It is indeed only a kind of town socage; as common socage, by which other lands are holden, is usually of a rural nature. A borough, as we have formerly seen, is usually distinguished from other towns by the right of sending members to parliament; and, where the right of election is by burgage tenure, that alone is a proof of the antiquity of the borough. Tenure in burgage, therefore, or burgage tenure, is where houses, or lands which were formerly the scite of houses, in an antient borough, are held of some lord in common socage, by a certain established rent. And these seem to have withstood the shock of the Norman encroachments principally on account of their insignificancy, which made it not worth while to compel them to an alteration of tenure; as an hundred of them put together would scarce have amounted to a knight's fee. Besides, the owners of them, being chiefly artificers and persons engaged in trade, could not with any tolerable propriety be put on such a military establishment, as the tenure in chivalry was. And here also we have again an instance, where a tenure is confessedly in socage, and yet could not possibly ever have been held by plough-service; since the tenants must have been citizens or burghers, the situation [83] frequently a walled town, the tenements single houses; so that none of the owners was probably master of a plough, or was able to use one, if he had it. The free socage therefore, in which these tenements are held, seems to be plainly a remnant of Saxon liberty; which may also account for the great variety of customs, affecting many of these tenements so held in antient burgage: the principal and most remarkable of which is that called *Borough English*, so named in contradistinction as it were to the Norman customs, and which is taken notice of by Glanvil[w], and by Littleton[x]; *viz.* that the youngest son, and not the eldest, succeeds to the burgage tenement on the death of his father. For which Littleton[y] gives this reason; because the younger son, by reason of his

[s] *lib.* 7. *cap* 3.
[t] § 162.
[u] Litt. § 162, 163.
[w] *ubi supra.*
[x] § 165.
[y] § 211.

tender age, is not so capable as the rest of his brethren to help himself. Other authors[z] have indeed given a much stranger reason for this custom, as if the lord of the fee had antiently a right of concubinage with his tenant's wife on her wedding-night; and that therefore the tenement descended not to the eldest, but the youngest son, who was more certainly the offspring of the tenant. But I cannot learn that ever this custom prevailed in England, though it certainly did in Scotland, (under the name of *mercheta* or *marcheta*,) till abolished by Malcolm III.[a] And perhaps a more rational account than either may be fetched (though at a sufficient distance) from the practice of the Tartars; among whom, according to father Duhalde, this custom of descent to the youngest son also prevails. That nation is composed totally of shepherds and herdsmen; and the elder sons, as soon as they are capable of leading a pastoral life, migrate from their father with a certain allotment of cattle; and go to seek a new habitation. The youngest son, therefore, who continues latest with the father, is naturally the heir of his house, the rest being already provided for. And thus we find that, among many other northern nations, it was the custom for all the sons but one to
[84] migrate from the father, which one became his heir[b]. So that possibly this custom, wherever it prevails, may be the remnant of that pastoral state of our British and German ancestors, which Cæsar and Tacitus describe. Other special customs there are in different burgage tenures; as that, in some the wife shall be endowed of *all* her husband's tenements[c], and not of the third part only, as at the common law: and that, in others, a man might dispose of his tenements by will[d], which, in general, was not permitted after the conquest till the reign of Henry the eighth; though in the Saxon times it was allowable[e]. A pregnant proof that these liberties of socage tenure were fragments of Saxon liberty.

The nature of the tenure in *gavelkind* affords us a still stronger argument. It is universally known what struggles

[z] 3 Mod. Pref.

[a] Seld. ut. of hon. 2. 1. 47. n. 188. f 995. *Reg. Mag. l. 4. c. 31.*

[b] *Pater cunctos filios adultos a se pellebat, praeter unum quem haeredem sui juris relinquebat.* (*Walsingh. Upodigm. Neustr. c. 1.*

[c] Litt § 166.

[d] § 167.

[e] Wright, 172.

the Kentish men made to preserve their antient liberties, and with how much success those struggles were attended. (4) And as it is principally here that we meet with the custom of gavelkind, (though it was and is to be found in some other parts of the kingdom[f],) we may fairly conclude that this was a part of those liberties; agreeably to Mr. Selden's opinion, that gavelkind before the Norman conquest was the general custom of the realm[g]. The distinguishing properties of this tenure are various: some of the principal are these; 1. The tenant is of age sufficient to aliene his estate by feoffment at the age of fifteen[h]. 2. The estate does not escheat in case of an attainder and execution for felony; their maxim being "the father to the bough, the son to the plough[i]." (5) 3. In most places he had a power of devising lands by will, before the statute for that purpose was made[k]. 4. The lands descend, not to the eldest, youngest, or any one son only, but to all the sons together[l]; which was indeed antiently the most

[f] Stat. 32 Hen. VIII. c. 29. Kitch. of courts, 200.

[g] *In toto regno, ante ducis adventum, frequens et usitata fuit: postea caeteris ademptа, (sed privatis quorundam locorum consuetudinibus alibi postea reger-minans,) Cantianis solum integra et inviolata remansit.* (*Analect. l.* 2. *c.* 7.)

[h] Lamb. Peramb. 614.

[i] Lamb. 634.

[k] F. N. B. 198. Cro. Car. 561.

[l] Litt. § 210.

(4) It is agreed on all hands that the men of Kent, by their situation, were the first whose opposition William would have had to subdue; but modern historians, upon antient authorities, deny that they made any remarkable struggles against him. See Hume, Turner, and Lingard, the last of whom cites the words of an eye-witness, William of Poitou: "*Occurrunt ultro Cantuarii haud procul a Dovera, jurant fidelitatem, dant obsides.*" This suggests a more plausible reason for the preservation of their customs; William's first ground in this country was certainly not that of conquest; he claimed under the will of the Confessor; it seems, therefore, quite natural that to those who first and spontaneously submitted themselves to him, he might without scruple promise the observance of all their antient rights. On the other hand, if these concessions had been extorted from him by force, when he was too weak to resist, it is probable that they would have been resumed, when all resistance was overcome.

(5) Gavelkind lands escheat for want of heirs; and even in felony, if the felon withdraw himself out of the country, and be outlawed, the king is entitled to the year and day of his lands and tenements, and they will afterwards escheat to the lord. The law was the same while sanctuary was allowed, if the felon had taken to it and abjured the realm. Robins. Gavel. p. 229. 2d edit. Wright, 209.

usual course of descent all over England [m], though in particular places particular customs prevailed. These, among other properties, distinguished this tenure in a most remarkable manner: and yet it is said to be only a species of a socage tenure, modified by the custom of the country; the lands being holden by suit of court and fealty, which is a service in it's nature certain [n]. Wherefore by a charter of king John [o], Hubert archbishop of Canterbury was authorized to *exchange* the gavelkind tenures holden of the see of Canterbury into tenures by knight's service; and by statute 31 Hen. VIII. c. 3. for disgavelling the lands of divers lords and gentlemen in the county of Kent, they are directed to be descendible for the future *like other lands which were never holden by service of socage*. Now the immunities which the tenants in gavelkind enjoyed were such, as we cannot conceive should be conferred upon mere ploughmen and peasants; from all which I think it sufficiently clear that tenures in free socage are in general of a nobler original than is assigned by Littleton, and after him by the bulk of our common lawyers. (6)

Having thus distributed and distinguished the several species of tenure in free socage, I proceed next to shew that this also partakes very strongly of the feodal nature. Which may probably arise from it's antient Saxon original; since (as was before observed [p]) feuds were not unknown among the Saxons,

[m] Glanvil. *l.* 7. c. 3.
[n] Wright, 211.
[o] Spelm. *cod. vet. leg.* 355.
[p] pag. 48.

(6) It is difficult to resist the conclusion to which sir M. Wright comes, that gavelkind was a feudal tenure; and the partible quality of the lands in their descent becomes an additional reason for thinking so, if it be true, as he states, that all tenures by socage, or of the nature of socage, were antiently in point of succession divisible. But if gavelkind be of feudal origin, and was only *preserved* by the men of Kent from the Norman conquest, having been previously to that the general custom of the realm, it follows of course that the feudal system, in some shape, prevailed in this kingdom under the Anglo-Saxon dynasty.

Several statutes have been made, beside the one mentioned in the text, for disgavelling particular lands in Kent; the effect of these is to destroy the partible quality of the descent only, and to leave untouched their other privileges. Thus they remained devisable by the custom before the statute 12 C. 2., and still remain exempt from escheat for felony. Robins. Gavel. 2d edit. 76.

though they did not form a part of their military policy, nor were drawn out into such arbitrary consequences as among the Normans. It seems therefore reasonable to imagine, that socage tenure existed in much the same state before the conquest as after; that in Kent it was preserved with a high hand, as our histories inform us it was; and that the rest of the socage tenures dispersed through England escaped the general fate of other property, partly out of favour and affection to their particular owners, and partly from their own insignificancy: since I do not apprehend the number of socage tenures soon after the conquest to have been very considerable, nor their value by any means large; till by successive charters [86] of enfranchisement granted to the tenants, which are particularly mentioned by Britton [q], their number and value began to swell so far, as to make a distinct, and justly envied, part of our English system of tenures.

However this may be, the tokens of their feodal original will evidently appear from a short comparison of the incidents and consequences of socage tenure with those of tenure in chivalry; remarking their agreement or difference as we go along.

1. In the first place, then, both were held of superior lords; one of the king, either immediately, or as lord paramount, and (in the latter case) of a subject or mesne lord between the king and the tenant. (7)

2. Both were subject to the feodal return, render, rent, or service of some sort or other, which arose from a supposition of an original grant from the lord to the tenant. In the military tenure, or more proper feud, this was from it's nature uncertain; in socage, which was a feud of the improper kind, it was certain, fixed, and determinate, (though perhaps nothing more than bare fealty,) and so continues to this day.

[q] c. 66.

(7) There is some mistake in introducing the word "one" into this sentence, because both might be held of the king in chief, and both of him as lord paramount.

3. Both were, from their constitution, universally subject (over and above all other renders) to the oath of fealty, or mutual bond of obligation between the lord and tenant [r]. Which oath of fealty usually draws after it suit to the lord's court. And this oath every lord, of whom tenements are holden at this day, may and ought to call upon his tenants to take in his court baron; if it be only for the reason given by Littleton [s], that if it be neglected, it will by long continuance of time grow out of memory (as doubtless it frequently hath done) whether the land be holden of the lord or not; and so he may lose his seignory, and the profit which may accrue to him by escheats and other contingencies [t].

4. The tenure in socage was subject, of common right, to aids for knighting the son and marrying the eldest daughter [u]:
[87] which were fixed by the statute Westm. 1. c. 36. at 20*s.* for every 20*l.* *per annum* so held; as in knight-service. These aids, as in tenure by chivalry, were originally mere benevolences, though afterwards claimed as matter of right; but were all abolished by the statute 12 Car. II.

5. Relief is due upon socage tenure, as well as upon tenure in chivalry: but the manner of taking it is very different. The relief on a knight's fee was 5*l.* or one quarter of the supposed value of the land; but a socage relief is one year's rent or render, payable by the tenant to the lord, be the same either great or small [w]: and therefore Bracton [x] will not allow this to be properly a relief, but *quaedam praestatio loco relevii in recognitionem domini.* So too the statute 28 Edw. I. c. 1. declares, that a free sokeman shall give *no relief*, but shall double his rent after the death of his ancestor, according to that which he hath used to pay his lord, and shall not be grieved above measure. Reliefs in knight-service were only payable, if the heir at the death of his ancestor was of full age: but in socage they were due even though the heir was under age, because the lord has no wardship over him [y]. The

[r] Litt. § 117. 131.
[s] § 130.
[t] *Eo maxime praestandum est, ne dubium reddatur jus domini et vetustate temporis obscuretur.* (*Corvin. jus feod. l. 2. c. 7.*)
[u] Co. Litt. 91.
[w] Litt. § 126.
[x] *l. 2. c. 36. § 8.*
[y] Litt. § 127.

statute of Charles II. reserves the reliefs incident to socage tenures; and therefore, wherever lands in fee-simple are holden by a rent, relief is still due of common right upon the death of a tenant[z]. (8)

6. PRIMER seisin was incident to the king's socage tenants *in capite*, as well as to those by knight-service[a]. But tenancy *in capite* as well as primer seisins are, among the other feodal burthens, entirely abolished by the statute.

7. WARDSHIP is also incident to tenure in socage; but of a nature very different from that incident to knight-service. For if the inheritance descend to an infant under fourteen, the wardship of him does not, nor ever did, belong to the lord of the fee; because in this tenure, no military or other [88] personal service being required, there was no occasion for the lord to take the profits, in order to provide a proper substitute for his infant tenant; but his nearest relation (to whom the inheritance cannot descend) shall be his guardian in socage, and have the custody of his land and body till he arrives at the age of fourteen. The guardian must be such a one, to whom the inheritance by no possibility can descend; as was fully explained, together with the reasons for it, in the former book of these commentaries[b]. At fourteen this wardship in socage ceases; and the heir may oust the guardian and call him to account for the rents and profits[c]: for at this age the law supposes him capable of chusing a guardian for himself. It was in this particular, of wardship, as also in that of marriage, and in the certainty of the render or service, that the socage tenures had so much the advantage of the military

[z] 3 Lev. 145.
[a] Co. Litt. 77.
[b] Vol. I. page 461.
[c] Litt. § 123. Co. Litt. 89.

(8) Where the tenure is by fealty only, of course there can of *common right* be no relief, for being a year's rent it cannot be calculated if no rent be payable. Co. Litt. 93. a. But by custom or express reservation there may be a relief wholly unconnected with the yearly rent, and this, it is presumed, may be payable when there is no yearly rent. In Hargrave and Butler's Co. Litt. is a learned note by the former, p. 93. a. n. (2), pointing out several differences between socage relief, proper and improper or payable only by special custom or express reservation; to this I refer the student.

ones. But as the wardship ceased at fourteen, there was this disadvantage attending it: that young heirs, being left at so tender an age to chuse their own guardians till twenty-one, might make an improvident choice. Therefore, when almost all the lands in the kingdom were turned into socage tenures, the same statute 12 Car. II. c. 24. enacted, that it should be in the power of any father by will to appoint a guardian, till his child should attain the age of twenty-one. (9) And, if no such appointment be made, the court of chancery will frequently interpose, and name a guardian, to prevent an infant heir from improvidently exposing himself to ruin.

8. Marriage, or the *valor maritagii*, was not in socage tenure any perquisite or advantage to the guardian, but rather the reverse. For, if the guardian married his ward under the age of fourteen, he was bound to account to the ward for the value of the marriage, even though he took nothing for it, unless he married him to advantage[d]. For, the law in favour of infants is always jealous of guardians, and therefore in this case it made them account, not only for what they *did*, but
[89] also for what they *might*, receive on the infant's behalf; lest by some collusion the guardian should have received the value, and not brought it to account: but the statute having destroyed all values of marriages, this doctrine of course hath ceased with them. At fourteen years of age the ward might have disposed of himself in marriage, without any consent of his guardian, till the late act for preventing clandestine marriages. These doctrines of wardship and marriage in socage tenure were so diametrically opposite to those in knight-service, and so entirely agree with those parts of king Edward's laws, that were restored by Henry the first's charter, as might alone convince us that socage was of a higher original than the Norman conquest.

9. Fines for alienation were, I apprehend, due for lands holden of the king *in capite* by socage tenure, as well as in case of tenure by knight-service: for the statutes that relate

[d] Litt. § 123.

(9) See Vol. I. p. 462.

to this point, and sir Edward's Coke's comment on them[e], speak generally of all tenants *in capite*, without making any distinction: but now all fines for alienation are demolished by the statute of Charles the second.

10. ESCHEATS are equally incident to tenure in socage, as they were to tenure by knight-service; except only in gavelkind lands, which are (as is before mentioned) subject to no escheats for felony, though they are to escheats for want of heirs[f].

THUS much for the two grand species of tenure, under which almost all the free lands of the kingdom were holden till the restoration in 1660, when the former was abolished and sunk into the latter; so that lands of both sorts are now holden by one univeral tenure of free and common socage.

THE other grand division of tenure mentioned by Bracton, as cited in the preceding chapter, is that of *villenage*, as contradistinguished from *liberum tenementum*, or frank tenure. And this (we may remember) he subdivided into two classes, *pure* and *privileged* villenage: from whence have arisen two other species of our modern tenures.

III. FROM the tenure of pure villenage have sprung our present *copyhold* tenures, or tenure by copy of court roll at [90] the will of the lord: in order to obtain a clear idea of which, it will be previously necessary to take a short view of the original and nature of manors.

MANORS are in substance as antient as the Saxon constitution, though perhaps differing a little, in some immaterial circumstances, from those that exist at this day[g]: just as we observed of feuds, that they were partly known to our ancestors, even before the Norman conquest. A manor, *manerium, a manendo*, because the usual residence of the owner seems to have been a district of ground, held by lords or great personages; who kept in their own hands so much land as

[e] 1 Inst. 43. 2 Inst. 65, 66, 67. [g] Co. Cop. § 2 & 10.
[f] Wright, 210.

was necessary for the use of their families, which were called *terrae dominicales* or *demesne* lands: being occupied by the lord, or *dominus manerii*, and his servants. The other, or *tenemental*, lands they distributed among their tenants; which from the different modes of tenure were distinguished by two different names. First, *book-land*, or charter-land, which was held by deed under certain rents and free-services, and in effect differed nothing from the free-socage lands[h]; and from hence have arisen most of the freehold tenants who hold of particular manors, and owe suit and service to the same. The other species was called *folk-land*, which was held by no assurance in writing, but distributed among the common folk or people at the pleasure of the lord, and resumed at his discretion; being indeed land held in villenage, which we shall presently describe more at large. (10) The residue of the manor being uncultivated, was termed the lord's waste, and served for public roads, and for common or pasture to the lord and his tenants. Manors were formerly called baronies, as they still are lordships: and each lord or baron was empowered to hold a domestic court, called the court-baron, for redressing misdemesnors and nuisances within the manor; and for settling disputes of property among the tenants. (11) This court is an inseparable ingredient of every manor; and if the number of suitors should so fail as not to leave suffi-

[h] Co. Cop. § 8.

(10) Lord Coke having divided the lands of a Saxon manor into demesnes or inlands, and services or outlands, subdivides *demesnes* into bookland and folkland; it is clear, however, that he must have intended what the author cites him as having done, or more properly, as his authority for doing, that is, to divide the tenemental or service lands into bookland and folkland, for the division cannot apply to the demesne lands

(11) *Manerium est feodum nobile, partim vassallis, quos tenentes vocamus, ob certa servitia concessum, partim Domino in usum familiæ suæ, cum jurisdictione in vassallos ob concessa prædia, reservatum. Quæ vassallis concedunter, terras dicimus tenementales; quæ domino reservantur, dominicales: totum vero feodum dominium appellatur, olim Baronia, unde curia, quæ huic præest jurisdictioni, hodie curiæ Baronis nomen retinet.* Spelm. Gloss. *Manerium. Conf. cund. in voc. Baronia*, p. 73. Wright, 163. Upon the expression, *Curia Baronis*, in this passage, I would just observe, that at p. 53. Vol. III. the author calls this "the court of the barons," i. e. the freeholders; but it is properly the court of the baron, i. e. of the lord. The stile is *Curia Baronis*, A. B. &c.

cient to make a jury or homage, that is, two tenants at least, the manor itself is lost.[1] (12)

In the early times of our legal constitution, the king's greater barons, who had a large extent of territory held under the crown, granted out frequently smaller manors to inferior persons to be holden of themselves: which do therefore now continue to be held under a superior lord, who is called in such cases the lord paramount over all these manors; and his seignory is frequently termed an honour, not a manor, especially if it hath belonged to an ancient feodal baron, or hath been at any time in the hands of the crown. In imitation whereof these inferior lords began to carve out and grant to others still more minute estates, to be held as of themselves, and were so proceeding downwards *in infinitum*: till the superior lords observed, that by this method of subinfeudation they lost all their feodal profits of wardships, marriages, and escheats, which fell into the hands of these mesne or middle lords, who were the immediate superiors of the *terre-tenant*, or him who occupied the land: and also that the mesne lords themselves were so impoverished thereby, that they were disabled from performing their services to their own superiors. This occasioned, first, that provision in the thirty-second chapter of *magna carta*, 9 Hen. III.) which is not to be found in the first charter granted by that prince, nor in the great charter of king John[j]) that no man should either give or sell his land, without reserving sufficient to

[1] Co. Cop. § 31. [j] See the Oxford editions of the charters.

(12) In the case of *Glover* v. *Lane*, 3 *T. R.* 447. Lord Kenyon said, that to constitute a manor it was necessary, not only that there should be two freeholders within the manor, but two freeholders holding of the manor subject to escheats.

The reason assigned for this number is, that freemen could only be tried by their peers, and, if there be one tenant only, he has no peer or judge. But this reason would evince the necessity of there being more than two, for if one were plaintiff and the other defendant, no court at all could be holden to try the cause. In Brooke's Abr. tit. *Cause a remover plee*, pl. 35. it is said that the parol was removed from the court baron because there were only four suitors, and he makes a quære of the smallest competent number. The reference is to the Register, f. 11. where such a precedent is given in a *mort d'auncestor*.

answer the demand of his lord; and afterwards the statute of Westm. 3. or *quia emptores*, 18 Edw. I. c. 1. which directs, that, upon all sales or feoffments of land, the feoffee shall hold the same, not of his immediate feoffor, but of the chief lord of the fee, of whom such feoffor himself held it. (13) But these provisions, not extending to the king's own tenants *in capite*, the like law concerning them is declared by the statutes of *prerogativa regis*, 17 Edw. II. c. 6. and of 34 Edw. III. c. 15. by which last all subinfeudations, previous to
[92] the reign of king Edward I., were confirmed: but all subsequent to that period were left open to the king's prerogative. And from hence it is clear, that all manors existing at this day, must have existed as early as king Edward the first: for it is essential to a manor, that there be tenants who hold of the lord; and by the operation of these statutes, no tenant *in capite* since the accession of that prince, and no tenant of a common lord since the statute of *quia emptores*, could create any new tenants to hold of himself.

Now with regard to the folk-land, or estates held in villenage, this was a species of tenure neither strictly feodal, Norman, or Saxon; but mixed and compounded of them all[k]: and which also, on account of the heriots that usually attend it, may seem to have somewhat Danish in it's composition. Under the Saxon government there were, as sir William Temple speaks[l], a sort of people in a condition of downright servitude, used and employed in the most servile works, and belonging, both they, their children and effects, to the lord of the soil, like the rest of the cattle or stock upon it. These seem to have been those who held what was called the folk-land, from which they were removable at the lord's pleasure. On the arrival of the Normans here, it seems not improbable, that they who were strangers to any other than a feodal state, might give some sparks of enfranchisement to such wretched

[k] Wright, 215. [l] Introd. Hist. Engl. 59.

(13) See ante, p. 72. n. (12), for the principle on which, in alienations by an inferior tenant, the service would naturally result to the alienor. It may be questioned indeed whether before the statute of *Quia Emptores*, a service could be reserved to, or a tenure created from, any one but the feoffor, or alienor.

persons as fell to their share, by admitting them, as well as others, to the oath of fealty; which conferred a right of protection, and raised the tenant to a kind of estate superior to downright slavery, but inferior to every other condition [m]. This they called villenage, and the tenants villeins, either from the word *vilis*, or else, as sir Edward Coke tells us [n], *a villa*; because they lived chiefly in villages, and were employed in rustic works of the most sordid kind; resembling the Spartan *helotes*, to whom alone the culture of the lands was consigned; their rugged masters, like our northern ancestors, esteeming war the only honourable employment of mankind.

[93]

These villeins, belonging principally to lords of manors, were either villeins *regardant*, that is, annexed to the manor or land: or else they were *in gross*, or at large, that is, annexed to the person of the lord, and transferable by deed from one owner to another [o]. They could not leave their lord without his permission; but if they ran away, or were purloined from him, might be claimed and recovered by action, like beasts or other chattels. They held indeed small portions of land by way of sustaining themselves and families; but it was at the mere will of the lord, who might dispossess them whenever he pleased; and it was upon villein services, that is, to carry out dung, to hedge and ditch the lord's demesnes, and any other the meanest offices [p]: and their services were not only base, but uncertain both as to their time and quantity [q]. A villein, in short, was in much the same state with us, as lord Molesworth [r] describes to be that of the boors in Denmark, and which Stiernhook [s] attributes also to the *traals* or slaves in Sweden; which confirms the probability of their being in some degree monuments of the Danish tyranny. (13) A villein could acquire no property either in

[m] Wright. 217.
[n] 1 Inst. 116.
[o] Litt. § 181.
[p] *Ibid.* § 172.
[q] *Ille qui tenet in villenagio facit quicquid ei praeceptum fuerit, nec scire debet sero quid facere debet in crastino, et semper tenebitur ad incerta.* (Bracton, *l.* 4. *tr.* 1. *c.* 28. § 5.
[r] *c.* 8.
[s] *de jure sueonum, l.* 2. *c.* 4.

(13) If this were so, one would expect to find villenage more common in the parts of England which the Danes permanently conquered and colonized.

lands or goods: but, if he purchased either, the lord might enter upon them, oust the villein, and seize them to his own use, unless he contrived to dispose of them again before the lord had seized them; for the lord had then lost his opportunity [t].

In many places also a fine was payable to the lord, if the villein presumed to marry his daughter to any one without leave from the lord [u]; and, by the common law, the lord might also bring an action against the husband for damages in thus purloining his property [w]. For the children of villeins were also in the same state of bondage with their parents; [94] whence they were called in Latin, *nativi*, which gave rise to the female appellation of a villein, who was called a *neife* [x]. In case of a marriage between a freeman and a neife, or a villein and a freewoman, the issue followed the condition of the father, being free if he was free, and villein if he was villein; contrary to the maxim of the civil law, that *partus sequitur ventrem*. But no bastard could be born a villein, because by another maxim of our law he is *nullius filius*: and as he can *gain* nothing by inheritance, it were hard that he should *lose* his natural freedom by it [y]. The law, however, protected the persons of villeins, as the king's subjects, against atrocious injuries of the lord: for he might not kill, or maim his villein [z]; though he might beat him with impunity, since the villein had no action or remedy at law against his lord, but in case of the murder of his ancestor, or the maim of his own person. (14) Neifs indeed had also an appeal of rape in case the lord violated them by force [a].

[t] Litt § 177.
[u] Co. Litt. 140.
[w] Litt. § 202.
[x] *Ibid.* § 186.
[y] Litt. § 187, 188.
[z] *Ibid.* § 189. 194.
[a] *Ibid.* § 190.

lonized. I am not aware that there is any evidence that this was the case; the reduction of the British inhabitants to slavery who survived the contest with the Saxons, and who did not fly from their country, seems to furnish a more plausible origin for villenage.

(14) In case of mayhem he had no remedy by action or appeal, for the damages recovered in either case might immediately have been seized by the lord, and so the proceeding would have been illusory. But the lord was subject to an indictment at the king's suit. Litt. s. 194.

VILLEINS might be enfranchised by manumission, which is either express or implied: express, as where a man granted to the villein a deed of manumission[b]: implied, as where a man bound himself in a bond to his villein for a sum of money, granted him an annuity by deed, or gave him an estate in fee, for life or years[c]; for this was dealing with his villein on the footing of a freeman, it was in some of the instances giving him an action against his lord, and in others vesting in him an ownership entirely inconsistent with his former state of bondage. So also if the lord brought an action against his villein, this enfranchised him[d]; for as the lord might have a short remedy against his villein, by seising his goods, (which was more than equivalent to any damages he could recover,) the law which is always ready to catch at any thing in favour of liberty, presumed that by bringing this action he meant to set his villein on the same footing with himself, and therefore held it an implied manumission. But, in case the lord indicted him for felony, it was otherwise; for the lord could not inflict a capital punishment on his villein, without calling in the assistance of the law. [95]

VILLEINS, by these and many other means, in process of time gained considerable ground on their lords; and in particular strengthened the tenure of their estates to that degree, that they came to have in them an interest in many places full as good, in others better than their lords. For the good-nature and benevolence of many lords of manors having, time out of mind, permitted their villeins and their children to enjoy their possessions without interruption, in a regular course of descent, the common law, of which custom is the life, now gave them title to prescribe against their lords; and, on performance of the same services, to hold their lands, in spight of any determination of the lord's will. For though in general they are still said to hold their estates at the will of the lord, yet it is such a will as is agreeable to the custom of the manor; which customs are preserved and evidenced by the rolls of the several courts baron in which they are entered, or kept on foot by the constant immemorial usage of

[b] Litt. § 204.
[c] § 204, 5, 6.
[d] § 208.

the several manors in which the lands lie. And, as such tenants had nothing to shew for their estates but these customs, and admissions in pursuance of them, entered on those rolls, or the copies of such entries witnessed by the steward, they now began to be called *tenants by copy of court-roll*, and their tenure itself a copyhold [e]. (15)

Thus copyhold tenures, as sir Edward Coke observes [f], although very meanly descended, yet come of an antient house; for, from what has been premised, it appears, that copyholders are in truth no other but villeins, who, by a long series of immemorial encroachments on the lord, have at last established a customary right to those estates, which before
[96] were held absolutely at the lord's will. Which affords a very substantial reason for the great variety of customs that prevail in different manors with regard both to the descent of the estates, and the privileges belonging to the tenants. And these encroachments grew to be so universal, that when tenure in villenage was virtually abolished (though copyholds were reserved) by the statute of Charles II., there was hardly a pure villein left in the nation. For sir Thomas Smith [g] testifies, that in all his time (and he was secretary to Edward VI.) he never knew any villein in gross throughout the realm; and the few villeins regardant that were then remaining were such only as had belonged to bishops, monasteries, or other ecclesiastical corporations, in the preceding times of popery. For he tells us, that "the holy fathers, monks, and friars, had in "their confessions, and especially in their extreme and deadly "sickness, convinced the laity how dangerous a practice it "was, for one Christian man to hold another in bondage: so "that temporal men, by little and little, by reason of that

[e] F. N. B. 12.
[f] Cop. § 32.
[g] Commonwealth, b 3. c. 10.

(15) See this obscure subject very ingeniously handled in Hallam's Middle Ages, c. viii. part 3. There is one important circumstance connected with villenage, and which must have facilitated the progress to the copyhold system, that as villeins by their lords sufferance might hold land of other persons by free tenure, so freemen might hold land by villein tenure. Persons in this last predicament were personally free, and such estates so held must have formed a useful link between free and servile tenures.

"terror in their consciences, were glad to manumit all their "villeins. But the said holy fathers, with the abbots and priors, "did not in like sort by theirs; for they also had a scruple "in conscience to impoverish and despoil the church so much, "as to manumit such as were bond to their churches, or to "the manors which the church had gotten; and so kept their "villeins still." By these several means the generality of villeins in the kingdom have long ago sprouted up into copyholders; their persons being enfranchised by manumission or long acquiescence; but their estates, in strictness, remaining subject to the same servile conditions and forfeitures as before; though, in general, the villein services are usually commuted for a small pecuniary quit rent [h].

As a farther consequence of what has been premised, we [97] may collect these two main principles, which are held [i] to be the supporters of the copyhold tenure, and without which it cannot exist: 1. That the lands be parcel of, and situate within that manor, under which it is held. 2. That they have been demised, or demisable, by copy of court-roll immemorially. For immemorial custom is the life of all tenures by copy; so that no new copyhold can, strictly speaking, be granted at this day.

In some manors, where the custom hath been to permit the heir to succeed the ancestor in his tenure, the estates are stiled copyholds of inheritance; in others, where the lords have been more vigilant to maintain their rights, they remain copyholds for life only: for the custom of the manor has in both cases so far superseded the will of the lord, that, provided the services be performed or stipulated for by fealty, he cannot, in the first instance, refuse to admit the heir of his tenant upon his death; nor, in the second, can he remove his present

[h] In some manors the copyholders were bound to perform the most servile offices, as to hedge and ditch the lord's grounds, to lop his trees, and reap his corn, and the like; the lord usually finding them meat and drink, and sometimes (as is still the use in the highlands of Scotland) a minstrel or piper for their diversion. (*Rot. Maner. de Edgware Comm. Mid.*) As in the kingdom of Whidah, on the Slave coast of Africa, the people are bound to cut and carry in the king's corn from off his demesne lands, and are attended by music during all the time of their labour. (Mod. Un. Hist. xvi. 429.)

[i] Co. Litt. 58.

tenant so long as he lives, though he holds nominally by the precarious tenure of his lord's will.

The fruits and appendages of a copyhold tenure, that it hath in common with free tenures, are fealty, services, (as well in rents as otherwise,) reliefs, and escheats. The two latter belong only to copyholds of inheritance; the former to those for life also. But besides these, copyholds have also heriots, wardship, and fines. Heriots, which I think are agreed to be a Danish custom, and of which we shall say more hereafter[1], are a render of the best beast or other good (as the custom may be) to the lord on the death of the tenant. This is plainly a relic of villein tenure; there being originally less hardship in it, when all the goods and chattels belonged to the lord, and he might have seised them even in the villein's lifetime. These are incident to both species of copyhold; but wardship
[98] and fines to those of inheritance only. Wardship, in copyhold estates, partakes both of that in chivalry and that in socage. Like that in chivalry, the lord is the legal guardian; who usually assigns some relation of the infant tenant to act in his stead; and he, like the guardian in socage, is accountable to his ward for the profits. (16) Of fines, some are in the nature of primer seisins, due on the death of each tenant;

[1] See ch. 28.

(16) There is some obscurity as to this point, but I imagine the account given of it in the text cannot be the correct one. As the tenure clearly savoured more of socage than chivalry, the lord, without a special custom warranting it, cannot well be supposed to be the guardian, but the nearest relation to whom the inheritance cannot descend. And, accordingly, in 2 Rolle's Abr. title Garde P. pl. 1. it is laid down by the court, that "if a copyhold descend to an infant within the age of fourteen, his *prochein amy*, to whom the land cannot descend, shall have the custody of it as he would of a freehold, unless there be a custom appointing it to another. If there be such a custom, that will still operate, and is not affected by the statute of Ch. 2. (See ante, p. 88.) But the present question is, who shall now be guardian where there is no custom; whether, though the statute will not operate to defeat a custom, it shall take place in the absence of any custom. Mr. Watkins is of opinion that it will, and even where there is a custom he thinks that the father, by will under the statute, may appoint a guardian of the body of his child. It is desirable that the law should be as he states it, but I am not aware that any decision to that effect has taken place. See 2 Watk. on Copyholds, 104.

others are mere fines for alienation of the lands; in some manors only one of these sorts can be demanded, in some both, and in others neither. They are sometimes arbitrary and at the will of the lord, sometimes fixed by custom; but, even when arbitrary, the courts of law, in favour of the liberty of copyholders, have tied them down to be *reasonable* in their extent; otherwise they might amount to a disherison of the estate. No fine, therefore, is allowed to be taken upon descents and alienations (unless in particular circumstances) (17) of more than two years improved value of the estate[k]. From this instance we may judge of the favourable disposition that the law of England (which is a law of liberty) hath always shewn to this species of tenants; by removing, as far as possible, every real badge of slavery from them, however some nominal ones may continue. It suffered custom very early to get the better of the express terms upon which they held their lands; by declaring, that the will of the lord was to be interpreted by the custom of the manor: and, where no custom has been suffered to grow up to the prejudice of the lord, as in this case of arbitrary fines, the law itself interposes with an equitable moderation, and will not suffer the lord to extend his power so far as to disinherit the tenant.

THUS much for the antient tenure of *pure* villenage, and the modern one of *copyhold at the will of the lord*, which is lineally descended from it.

IV. THERE is yet a fourth species of tenure, described by Bracton under the name sometimes of *privileged* villenage, and sometimes of *villein-socage*. This, he tells us[l], is such as has been held of the kings of England from the conquest downwards; that the tenants herein, "*villana faciunt servitia*, [99]

[k] 2 Ch. Rep. 134.

[l] *l.* 4. *tr.* 1. *c.* 28. § 5.

(17) These are where the lord is not compellable to admit, and where the grant on his part is voluntary, as in case of copyholds for lives where there is no right of renewal; or even where there is a binding custom to renew, but which allows the copyholder to put in more than one life at a time, for there in fact two admissions take place at once, and therefore there can be no hardship in a double fine. See Scriven on Copyholds, 374.

"*sed certa et determinata;*" that they cannot alienе or transfer their tenements by grant or feoffment, any more than pure villeins can: but must surrender them to the lord or his steward, to be again granted out and held in villenage. And from these circumstances we may collect, that what he here describes is no other than an exalted species of copyhold, subsisting at this day, viz. the tenure in *antient demesne;* to which, as partaking of the baseness of villenage in the nature of it's services, and the freedom of socage in their certainty, he has therefore given a name compounded out of both, and calls it *villanum socagium.*

Antient demesne consists of those lands or manors, which, though now perhaps granted out to private subjects, were actually in the hands of the crown in the time of Edward the confessor, or William the conqueror; and so appear to have been by the great survey in the exchequer called domesday-book [m]. The tenants of these lands, under the crown, were not all of the same order or degree. Some of them, as Britton testifies [n], continued for a long time pure and absolute villeins, dependent on the will of the lord: and those who have succeeded them in their tenures now differ from common copyholders in only a few points [o]. Others were in great measure enfranchised by the royal favour: being only bound in respect of their lands to perform some of the better sort of villein services, but those determinate and certain: as, to plough the king's land for so many days, to supply his court with such a quantity of provisions, or other stated services; all of which are now changed into pecuniary rents: and in consideration hereof they had many immunities and privileges granted to them [p]; as to try the right of their property in a peculiar court of their own, called a court of antient demesne, by a peculiar process, denominated a writ of *right close* [q]; not to pay toll or taxes; not to contribute to the expences of knights of the shire; nor to be put on juries; and the like [r].

[100] These tenants, therefore, though their tenure be absolutely copyhold, yet have an *interest* equivalent to a freehold: for

[m] F. N. B. 14. 16.
[n] c. 66.
[o] F. N. B. 228.
[p] 4 Inst. 269.
[q] F. N. B. 11.
[r] *Ibid.* 14.

notwithstanding their services were of a base and villenous original [s], yet the tenants were esteemed in all other respects to be highly privileged villeins; and especially for that their services were fixed and determinate, and that they could not be compelled (like pure villeins) to relinquish these tenements at the lord's will, or to hold them against their own: "*et* "*ideo*," says Bracton, "*dicuntur liberi.*" Britton, also, from such their freedom, calls them absolutely *sokemans*, and their tenure *sokemanries*; which he describes [t] to be "lands and "tenements, which are not held by knight-service, nor by "grand serjeanty, nor by petit, but by simple services, being, "as it were, lands enfranchised by the king or his predeces- "sors from their antient demesne." And the same name is also given them in Fleta [u]. Hence Fitzherbert observes [w], that no lands are antient demesne, but lands holden in socage; that is, not in free and common socage, but in this amphibious subordinate class of villein-socage. And it is possible, that as this species of socage tenure is plainly founded upon predial services, or services of the plough, it may have given cause to imagine that all socage tenures arose from the same original; for want of distinguishing with Bracton, between free socage or socage of frank tenure, and villein socage or socage of antient demesne.

LANDS holden by this tenure are therefore a species of copyhold, and as such preserved and exempted from the operation of the statute of Charles II. Yet they differ from common copyholds, principally in the privileges before mentioned: as also they differ from freeholders by one especial mark and tincture of villenage, noted by Bracton, and remaining to this day, viz. that they cannot be conveyed from man to man by the general common law conveyances of feoffment, and the rest; but must pass by surrender to the lord or his steward, in the manner of common copyholds: yet with this distinction [x], that in the surrender of these lands in [101] antient demesne, it is not used to say, "*to hold at the will o*

[s] Gilb. hist. of exch. 16. and 30.
[t] c. 66.
[u] *l.* 1. *c.* 8.
[w] N. B. 19.
[x] Kitchen on courts, 194.

the lord," in their copies, but only, " *to hold according to the* " *custom of the manor.*" (18)

Thus have we taken a compendious view of the principal and fundamental points of the doctrine of tenures, both antient and modern, in which we cannot but remark the mutual connexion and dependence that all of them have upon each other. And upon the whole it appears, that whatever changes and alterations these tenures have in process of time undergone, from the Saxon æra to the 12 Car. II. all lay tenures are now in effect reduced to two species; *free* tenure in common socage, and *base* tenure by copy of court-roll.

I mentioned *lay* tenures only; because there is still behind one other species of tenure, reserved by the statute of Charles II., which is of a *spiritual* nature, and called the tenure in frankalmoign.

---

(18) The qualities and privileges of antient demesne are very different and some of them are hardly reconcileable with the notion of its being a species of copyhold. Mr. Scriven states that there are three sorts of tenants in antient demesnes: one, of those who hold their lands freely by the grant of the king; a second, who hold of a manor which is antient demesne, but not at the will of the lord, and whose estates pass by surrender or deed and admittance, and who are denominated customary freeholders; and a third, who hold of a manor, which is antient demesne, by copy of court roll at the will of the lord, and are denominated copyholders of base tenure; which latter cannot maintain a writ of right close, or *monstraverunt*, but are to sue by plaint in the lord's court. On Copyholds, 656.

In the text, and in the cases generally, this fact is overlooked, though it is very important as explaining the variety mentioned above, and making even the highest privileges and the freest qualities not unreasonable with reference to some tenants in ancient demesne, to whom probably they ought to be confined.

Whatever be the kind of antient demesne, which a manor is pleaded to be, the truth of such plea is always tried by Domesday book, which has therefore been called *Liber Judicatorius*. This book contains a survey of all the manors throughout England, except those in the four northern counties and in part of Lancashire. It has been lately reprinted with great fidelity and correctness, by order of government, as well as a valuable supplement called the Boldon Book, which contains a similar survey of the palatinate of Durham, made by order of Bishop Pudsey, nephew to king Stephen, in the year 1183.

V. TENURE in *frankalmoign*, *in libera eleemosyna* or free alms, is that whereby a religious corporation, aggregate or sole, holdeth lands of the donor to them and their successors for ever[y]. The service which they were bound to render for these lands was not certainly defined; but only in general to pray for the souls of the donor and his heirs, dead or alive; and therefore they did no fealty, (which is incident to all other services but this[z],) because this divine service was of a higher and more exalted nature[a]. This is the tenure, by which almost all the antient monasteries and religious houses held their lands; and by which the parochial clergy, and very many ecclesiastical and eleemosynary foundations, hold them at this day[b] the nature of the service being upon the reformation altered, and made conformable to the purer doctrines of the church of England. It was an old Saxon tenure; and [102] continued under the Norman revolution through the great respect that was shewn to religion and religious men in antient times. Which is also the reason that tenants in *frankalmoign* were discharged of all other services, except the *trinoda necessitas*, of repairing the highways, building castles, and repelling invasions[c]: just as the Druids, among the antient Britons, had *omnium rerum immunitatem*[d]. And, even at present, this is a tenure of a nature very distinct from all others; being not in the least feodal, but merely spiritual. For if the service be neglected, the law gives no remedy by distress or otherwise to the lord of whom the lands are holden: but merely a complaint to the ordinary or visitor to correct it[e]. Wherein it materially differs from what was called *tenure by divine service*: in which the tenants were obliged to do some special divine services in certain; as to sing so many masses, to distribute such a sum in alms, and the like; which being expressly defined and prescribed, could with no kind of propriety be called *free* alms; especially as for this, if unperformed, the lord might distrein, without any complaint to the visitor[f]. (19) All such donations are indeed now out of

[y] Litt. § 133.
[z] *Ibid.* § 131.
[a] *Ibid.* 135.
[b] Bracton. *l.* 4. *tr.* 1. *c.* 28. § 1.
[c] Seld. *Jan.* 1. 42.
[d] Cæsar *de bell. Gall. l.* 6. *c.* 13
[e] Litt. § 136.
[f] *Ibid.* 137.

(19) And was intitled to fealty, as of course. Co. Litt, 97. a.

use; for since the statute of *quia emptores*, 18 Edw. I. none but the king can give lands to be holden by this tenure [s]. (20) So that I only mention them, because *frankalmoign is* excepted by name in the statute of Charles II. and therefore subsists in many instances at this day. Which is all that shall be remarked concerning it; herewith concluding our observations on the nature of tenures.

[s] Litt. § 140.

(20) The statute obliging all persons who alienated their lands, to reserve the tenure to the next immediate lord by *the same services*, by which they held themselves; this of course prevented for the future any conversion of lay into spiritual tenures. The king was not mentioned in the statute, nor could it apply to him.

CHAPTER THE SEVENTH.

OF FREEHOLD ESTATES, OF INHERITANCE.

THE next objects of our disquisitions are the nature and properties of *estates*. An estate in lands, tenements, and hereditaments, signifies such interest as the tenant hath therein: so that if a man grants all *his estate* in Dale to A and his heirs, every thing that he can possibly grant shall pass thereby [a]. It is called in Latin *status*; it signifying the condition, or circumstance, in which the owner stands with regard to his property. And to ascertain this with proper precision and accuracy, estates may be considered in a threefold view: first, with regard to the *quantity of interest* which the tenant has in the tenement: secondly, with regard to the *time* at which that quantity of interest is to be enjoyed: and, thirdly, with regard to the *number* and *connexions* of the tenants.

FIRST, with regard to the *quantity of interest* which the tenant has in the tenement, this is measured by it's duration and extent. Thus, either his right of possession is to subsist for an uncertain period, during his own life, or the life of another man: to determine at his own decease, or to remain to his descendants after him: or it is circumscribed within a certain number of years, months, or days: or lastly, it is infinite and unlimited, being vested in him and his representatives for ever. And this occasions the primary division of estates into such as are *freehold*, and such as are *less than freehold*. [104]

[a] Co. Litt. 345.

An estate of freehold, *liberum tenementum*, or franktenement, is defined by Britton [b] to be "the *possession* of the soil "by a freeman." And St. Germyn [c] tells us, that "the "possession of the land is called in the law of England the "franktenement or freehold." Such estate, therefore, and no other, as requires actual possession of the land, is, legally speaking, *freehold*: which actual possession can, by the course of the common law, be only given by the ceremony called livery of seisin, which is the same as the feodal investiture. And from these principles we may extract this description of a freehold; that it is such an estate in lands as is conveyed by livery of seisin, or in tenements of any incorporeal nature, by what is equivalent thereto. And accordingly it is laid down by Littleton [d], that where a freehold shall pass, it behoveth to have livery of seisin. As, therefore, estates of inheritance and estates for life could not by common law be conveyed without livery of seisin, these are properly estates of freehold; and, as no other estates were conveyed with the same solemnity, therefore no others are properly freehold estates.

Estates of freehold (thus understood) are either estates *of inheritance*, or estates *not of inheritance*. The former are again divided into inheritances *absolute* or fee-simple; and inheritances *limited*, one species of which we usually call fee-tail.

I. Tenant in fee-simple (or, as he is frequently styled, tenant in fee) is he that hath lands, tenements, or hereditaments, to hold to him and his heirs for ever [e]: generally, absolutely, and simply; without mentioning *what* heirs, but referring that to his own pleasure, or to the disposition of the law. The true meaning of the word fee (*feodum*) is the same with that of feud or fief, and in it's original sense it is
[105] taken in contradistinction to *allodium* [f]; which latter the writers on this subject define to be every man's own land, which he possesseth merely in his own right, without owing any rent or service to any superior. This is property in it's

[b] c. 32.
[c] Dr. & Stud. b. 2. d. 22.
[d] § 59.
[e] Litt. § 1.
[f] See p. 45. 47.

highest degree; and the owner thereof hath *absolutum et directum dominium*, and therefore is said to be seised thereof absolutely *in dominico suo* in his own demesne. But *feodum*, or fee, is that which is held of some superior, on condition of rendering him service; in which superior the ultimate property of the land resides. And therefore sir Henry Spelman [g] defines a feud or fee to be the right which the vasal or tenant hath in lands, to *use* the same, and take the profits thereof to him and his heirs, rendering to the lord his due services; the mere allodial *propriety* of the soil always remaining in the lord. This allodial property no subject in England has [h]; it being a received, and now undeniable, principle in the law, that all the lands in England are holden mediately or immediately of the king. The king therefore only hath *absolutum et directum dominium* [i]: but all subjects' lands are in the nature of *feodum* or fee; whether derived to them by descent from their ancestors, or purchased for a valuable consideration; for they cannot come to any man by either of those ways, unless accompanied with those feodal clogs which were laid upon the first feudatory when it was originally granted. A subject therefore hath only the usufruct, and not the absolute property of the soil; or, as sir Edward Coke expresses it [k], he hath *dominium utile*, but not *dominium directum*. And hence it is, that in the most solemn acts of law we express the strongest and highest estate that any subject can have, by these words, "he is seised thereof *in his demesne*, "*as of fee*." It is a man's demesne, *dominicum*, or property, since it belongs to him and his heirs for ever: yet this *dominicum*, property, or demesne, is strictly not absolute or allodial, but qualified or feodal: it is his demesne, *as of fee*: that is, it is not purely and simply his own, since it is held of a superior lord, in whom the ultimate property resides.

THIS is the primary sense and acceptation of the word *fee*. [106] But (as sir Martin Wright very justly observes [l]) the doctrine "that all lands are holden," having been for so many ages a fixed and undeniable axiom, our English lawyers do very

[g] of feuds, c. 1.
[h] Co. Litt. 1.
[i] *Praedium domini regis est directum dominium, cujus nullus est author nisi Deus.* Ibid.
[k] Co. Litt. 1.
[l] of ten. 148.

rarely (of late years especially) use the word *fee* in this it's primary original sense, in contradistinction to *allodium* or absolute property, with which they have no concern; but generally use it to express the continuance or quantity of estate. A *fee* therefore, in general, signifies an estate of inheritance; being the highest and most extensive interest that a man can have in a feud: and when the term is used simply, without any other adjunct, or has the adjunct of *simple* annexed to it, (as a fee, or a fee-simple,) it is used in contradistinction to a fee conditional at the common law, or a fee-tail by the statute: importing an absolute inheritance, clear of any condition, limitation, or restrictions to particular heirs, but descendible to the heirs general, whether male or female, lineal or collateral. And in no other sense than this is the king said to be seised in fee, he being the feudatory of no man [m].

Taking therefore *fee* for the future, unless where otherwise explained, in this it's secondary sense, as an estate of inheritance, it is applicable to, and may be had in, any kind of hereditaments either corporeal or incorporeal [n]. But there is this distinction between the two species of hereditaments: that, of a corporeal inheritance a man shall be said to be seised *in his demesne, as of fee*; of an incorporeal one, he shall only be said to be seised *as of fee*, and not in his demesne [o]. For, as incorporeal hereditaments are in their nature collateral to, and issue out of lands and houses [p], their owner hath no property, *dominicum* or demesne, in the *thing* itself, but hath only something derived out of it; resembling the *servitutes*, or services, of the civil law [q]. The *dominicum*
[107] or property is frequently in one man, while the appendage or service is in another. Thus Gaius may be seised *as of fee* of a way leading over the land, of which Titius is seised *in his demesne, as of fee*. (1)

[m] Co. Litt. 1.

[n] *Feodum est quod quis tenet sibi et haeredibus suis, sive sit tenementum, sive reditus, &c.* Flet. *l.* 5. *c.* 5. § 7.

[o] Litt. § 10.

[p] See page 20.

[q] *Servitus est jus, quo res mea alterius rei vel personae servit.* *Ff.* 8. 1. 1.

(1) See page 20., where the author does not confine incorporeal hereditaments to things issuing out of lands and houses, but to things issuing out of any thing corporate, real or personal. But the true reason of the distinction is clearly, not that the owner of the derivative has no property in

THE fee-simple or inheritance of lands and tenements is generally vested and resides in some person or other; though divers inferior estates may be carved out of it. As if one grants a lease for twenty-one years, or for one or two lives, the fee-simple remains vested in him and his heirs; and after the determination of those years or lives, the land reverts to the grantor or his heirs, who shall hold it again in fee-simple. Yet sometimes the fee may be in *abeyance*, that is (as the word signifies,) in expectation, remembrance, and contemplation in law; there being no person in *esse*, in whom it can vest and abide: though the law considers it as always potentially existing, and ready to vest whenever a proper owner appears. Thus, in a grant to John for life, and afterwards to the heirs of Richard, the inheritance is plainly neither granted to John nor Richard, nor can it vest in the heirs of Richard till his death, *nam nemo est haeres viventis*: it remains therefore in waiting or abeyance, during the life of Richard[r]. This is likewise always the case of a parson of a church, who hath only an estate therein for the term of his life; and the inheritance remains in abeyance[s]. And not only the fee, but the freehold also, may be in abeyance; as, when a parson dies, the freehold of his glebe is in abeyance, until a successor be named, and then it vests in the successor[t]. (2)

[r] Co. Litt. 342. [s] Litt. § 646. [t] Litt. § 647.

---

in the land or house from which it is derived, but that the thing in which he has a property, the right of way for instance, is incorporeal, and incapable of being *in manu*, or actual possession.

(2) This opinion, which may now be considered as exploded, was founded on a notion, generally speaking, true enough, that the operation of livery was immediate and entire, and therefore that the livery to John, in the case put, carried the remainder over with it at the same time out of the grantor; and if the remainder passed *from* the grantor, as it clearly passed for the present *to* nobody, this doctrine of abeyance was a necessary consequence. This conclusion, though couched in imposing terms, as abeyance, *in gremio legis*, and *in nubibus*, was by no means satisfactory; these terms of what might be called legal geography did not explain to any man's mind *where* the estate was in the interval. At the same time, certain opinions were held, seemingly inconsistent with it; for instance, it was laid down, that if John died in the life-time of Richard, as the heirs of Richard could never take (see post, 169.), the grantor should have the land again, the same grantor in whom, by the hypothesis, no estate remained. Mr. Fearne met the doctrine in the only way in which it could be met, by denying

The word "heirs" is necessary in the grant or donation, in order to make a fee, or inheritance. For if land be given to a man for ever, or to him and his assigns for ever, this vests in him but an estate for life[u]. This very great nicety about the insertion of the word "heirs," in all feoffments and grants, in order to vest a fee, is plainly a relic of the feodal strictness; by which we may remember[w] it was required that
[108] the form of the donation should be punctually pursued; or that, as Cragg[x] expresses it in the words of Baldus, "*do-nationes sint stricti juris, ne quis plus donasse praesumatur quam in donatione expresserit.*" And therefore, as the personal abilities of the donee were originally supposed to be the only inducements to the gift, the donee's estate in the land extended only to his own person, and subsisted no longer than

[u] Litt. § 1. [w] See page 56. [x] *l.* 1. *t.* 9. § 17.

---

ing the premisses, and reasoned, that if the remainder passed *to* nobody, it passed *from* nobody; but that there was a "suspension of the complete or absolute operation of such feoffment or conveyance in regard to the inheritance, till the intended channel for the reception of such inheritance came into existence." This principle will be found to explain all the cases in the text: whatever portion of the inheritance cannot take effect *in præsenti*, remains in the grantor or his heirs; and if the inheritance can never pass, as in the case of the church, it always remains there. See Fearne on Con. Rem. 359. 364. 6th edition.

With respect to the case of a freehold in abeyance, that seems, upon other grounds, as objectionable as the former; feudal principles always requiring an immediate tenant of the freehold for the performance of the services, and to answer to the action of a stranger.

The case put of the glebe during a vacancy of the church, is not, perhaps, easy of solution; that which Mr. Christian proposed in a note on this passage is not entirely satisfactory. He would place the freehold in the future successor, who is to be brought into view and notice by institution and induction. But if it is in him, it is not there usefully, for either of the purposes for which alone the law requires it to be in any one — the services are not performed, and there is no one to answer the *præcipe* of a stranger. The same objection indeed applies, if we place it in the heir of the founder, or the ordinary. Perhaps it may be thought not unreasonable to admit this to be an exception to the general rule; an estate altogether is the creature of legal reasoning, to be moulded, raised, or extinguished accordingly; and it may be fairly argued, that as the freehold can exist in no one to any useful legal purpose, during the vacancy of the church, it may not exist at all. This is a conjecture hazarded with great diffidence; but which may be allowed in a question of more curiosity than practical importance.

his life; unless the donor, by an express provision in the grant, gave it a longer continuance, and extended it also to his heirs. But this rule is now softened by many exceptions[y].

For, 1. It does not extend to devisees by will; in which, as they were introduced at the time when the feodal rigour was apace wearing out, a more liberal construction is allowed; and therefore by a devise to a man for ever, or to one and his assigns for ever, or to one in fee-simple, the devisee hath an estate of inheritance; for the intention of the devisor is sufficiently plain from the words of perpetuity annexed, though he hath omitted the legal words of inheritance. But if the devise be to a man and his assigns, without annexing words of perpetuity, there the devisee shall take only an estate for life; for it does not appear that the devisor intended any more.(3) 2. Neither does this rule extend to fines or recoveries considered as species of conveyance; for thereby an estate in fee passes by act and operation of law without the word "heirs," as it does also, for particular reasons, by certain other methods of conveyance, which have relation to a former grant or estate, wherein the word "heirs," was expressed[z].(4) 3. In creations of nobility by writ, the peer so created hath an inheritance in his title, without expressing the word "heirs;" for heirship is implied in the creation, unless it be otherwise specially provided: but in creations by patent, which are *stricti juris*, the word "heirs" must be inserted,

[y] Co. Litt. 9, 10. [z] *Ibid.* 9.

(3) The author means that it does not appear merely from the word "assigns" that the devisor intended any more. Where the gift is to a man and his assigns, it may be manifest from other parts of the will, that a fee was intended, and if so, will pass; as indeed it might if the word assigns were wholly omitted.

(4) This second class of exceptions (if indeed they can be called exceptions, being not against, but beside the rule,) cannot be made very intelligible, till a later part of the volume. But they all proceed on the principle, that these conveyances do not profess to create a new estate in the grantee, but either to acknowledge in him a pre-existing fee, to suffer a pre-existing fee wrongfully withheld from him to be recovered by him by judgment of law, or to pass to him by way of reference a fee properly described and conveyed in some other grant to some other person, as amply as it has been described and conveyed in that other grant so referred to.

otherwise there is no inheritance. (5) 4. In grants of lands to sole corporations and their successors, the word "successors" supplies the place of "heirs;" for as heirs take from the ancestor, so doth the successor from the predecessor. Nay, in
[109] a grant to a bishop, or other sole spiritual corporation, in *frankalmoign*; the word "*frankalmoign*" supplies the place of "successors" (as the word "successors" supplies the place of "heirs") *ex vi termini*; and in all these cases a fee-simple vests in such sole corporation. But, in a grant of lands to a corporation aggregate, the word "successors" is not necessary, though usually inserted: for, albeit such simple grant be strictly only an estate for life, yet as that corporation never dies, such estate for life is perpetual, or equivalent to a fee-simple, and therefore the law allows it to be one[a]. 5. Lastly, in the case of the king, a fee-simple will vest in him, without the word "heirs" or "successors" in the grant; partly from prerogative royal, and partly from a reason similar to the last, because the king in judgment of law never dies[b]. But the general rule is, that the word "heirs" is necessary to create an estate of inheritance.

II. We are next to consider limited fees, or such estates of inheritance as are clogged and confined with conditions, or qualifications, of any sort. And these we may divide into two sorts: 1. *Qualified*, or *base* fees; and, 2. Fees *conditional*, so called at the common law; and afterwards fees-tail, in consequence of the statute *de donis*.

1. A base, or qualified fee, is such a one as hath a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end. As, in the case of a grant to A, and his heirs, *tenants of the manor of Dale*; in this instance, whenever the heirs of A cease to be tenants of that manor, the grant is entirely defeated. So, when Henry VI. granted to John Talbot, lord of the manor of Kingston-Lisle in Berks, that he and his heirs, lords of the said manor, should be peers of the realm, by the title of

[a] See Vol. I. p. 484. [b] See Vol. I. p. 249.

(5) See Vol. I. p. 400.

barons of Lisle; here John Talbot had a base or qualified fee in that dignity[c], and, the instant he or his heirs quitted the seigniory of this manor, the dignity was at an end. This estate is a fee, because by possibility it may endure for ever [110] in a man and his heirs: yet as that duration depends upon the concurrence of collateral circumstances, which qualify and debase the purity of the donation, it is therefore a qualified or base fee. (6)

2. A CONDITIONAL fee, at the common law, was a fee restrained to some particular heirs, exclusive of others: "*donatio stricta et coarctata*[d]; *sicut certis haeredibus, quibusdam* "*a successione exclusis*; as to the heirs *of a man's body*, by which only his lineal descendants were admitted, in exclusion of collateral heirs; or to the heirs *male of his body*, in exclusion both of collaterals, and lineal females also. It was called a conditional fee, by reason of the condition expressed or implied in the donation of it, that if the donee died without such particular heirs, the land should revert to the donor. For this was a condition annexed by law to all grants whatsoever; that, on failure of the heirs specified in the grant, the grant should be at an end, and the land return to it's antient proprietor[e]. Such conditional fees were strictly agreeable to the nature of feuds, when they first ceased to be mere estates for life, and were not yet arrived to be absolute estates in fee-simple. And we find strong traces of these limited, conditional fees, which could not be alienated from the lineage of the first purchaser, in our earliest Saxon laws[f].

Now, with regard to the condition annexed to these fees by the common law, our ancestors held, that such a gift (to a

[c] Co. Litt. 27.

[d] Flet. *l.* 3. *c.* 3. § 5.

[e] Plowd. 241.

[f] *Si quis terram haereditariam habeat, quam parentes ejus ipsi reliquerunt, tunc statuimus, ut eam non vendat a cognatis haeredibus suis, si adsit scriptura vel testis, quod illi viro prohibitum sit, qui eam ab initio acquisivit, et illi qui eam vendidit, ut ita facere nequeat. LL. Aelfred.* c. 37.

(6) The owner of a base fee has the same rights and privileges while his estate lasts, as if he were tenant in fee-simple. Cruise, Digest. 1. 79.

man and the heirs of his body) was a gift upon condition, that it should revert to the donor, if the donee had no heirs of his body; but, if he had, it should then remain to the donee. They therefore called it a fee-simple, on condition that he had issue. Now we must observe, that, when any condition is performed, it is thenceforth entirely gone; and the thing to which it was before annexed, becomes absolute, and wholly
[111] unconditional. So that, as soon as the grantee had any issue born, his estate was supposed to become absolute, by the performance of the condition; at least, for these three purposes: 1. To enable the tenant to aliene the land, and thereby to bar not only his own issue, but also the donor of his interest in the reversion[g]. 2. To subject him to forfeit it for treason; which he could not do, till issue born, longer than for his own life; lest thereby the inheritance of the issue, and reversion of the donor, might have been defeated[h]. 3. To empower him to charge the land with rents, commons, and certain other incumbrances, so as to bind his issue[i]. And this was thought the more reasonable, because, by the birth of issue, the possibility of the donor's reversion was rendered more distant and precarious: and *his* interest seems to have been the only one which the law, as it then stood, was solicitous to protect; without much regard to the right of succession intended to be vested in the issue. However, if the tenant did not in fact aliene the land, the course of descent was not altered by this performance of the condition: for if the issue had afterwards died, and then the tenant, or original grantee, had died, without making any alienation; the land, by the terms of the donation, could descend to none but the heirs *of his body*, and therefore, in default of them, must have reverted to the donor. (7) For which reason, in order to subject the lands to the ordinary course of descent, the donees

[g] Co. Litt. 19. 2 Inst. 333.
[h] Co. Litt. 19. 2 Inst. 334.
[i] Co. Litt. 19.

(7) The course of descent was under certain circumstances altered by the performance of the condition, even where no alienation was made; for where the gift was in special tail, after issue had, the land became descendible to all the heirs of the donee's body, whether by the person named in the gift or any other person. The statute *de donis* prohibits this for the future. Paine's case, 8 Rep. 35 b.

of these conditional fee-simples took care to aliene as soon as they had performed the condition by having issue; and afterwards repurchased the lands, which gave them a fee-simple absolute, that would descend to the heirs general, according to the course of the common law. And thus stood the old law with regard to conditional fees; which things, says sir Edward Coke [k], though they seem antient, are yet necessary to be known; as well for the declaring how the common law stood in such cases, as for the sake of annuities, and such like inheritances, as are not within the statutes of entail, and therefore remain as at the common law.

THE inconveniences, which attended these limited and fettered inheritances, were probably what induced the judges to give way to this subtle finesse of construction (for such it undoubtedly was), in order to shorten the duration of these conditional estates. But, on the other hand, the nobility, who were willing to perpetuate their possessions in their own families, to put a stop to this practice, procured the statute of Westminster the second [l] (commonly called the statute *de donis conditionalibus*) to be made; which paid a greater regard to the private will and intentions of the donor, than to the propriety of such intentions, or any public considerations whatsoever. This statute revived in some sort the antient feodal restraints which were originally laid on alienations, by enacting, that from thenceforth the will of the donor be observed; and that the tenements so given (to a man and the heirs of his body) should at all events go to the issue, if there were any; or, if none, should revert to the donor. [112]

UPON the construction of this act of parliament, the judges determined that the donee had no longer a conditional fee-simple, which became absolute and at his own disposal, the instant any issue was born; but they divided the estate into two parts, leaving in the donee a new kind of particular estate, which they denominated a *fee-tail* [m]; and vesting in

[k] 1 Inst. 19.

[l] 13 Edw. I. c. 1.

[m] The expression *fee tail* or *feodum talliatum*, was borrowed from the feudists (See Crag. *l.* 1. *t.* 10. § 24, 25.); among whom it signified any mutilated or truncated inheritance, from which the heirs general were *cut* off being derived from the barbarous verb *taliare*, to cut; from which the French *tailler* and the Italian *tagliare* are formed (Spelm. *Gloss.* 531.]

the donor the ultimate fee-simple of the land, expectant on the failure of issue; which expectant estate is what we now call a reversion [n]. And hence it is that Littleton tells us [o], that tenant in fee-tail is by virtue of the statute of Westminster the second.

Having thus shewn the *original* of estates-tail, I now proceed to consider, *what things* may, or may not, be entailed
[113] under the statute *de donis*. *Tenements* is the only word used in the statute: and this sir Edward Coke [p] expounds to comprehend all corporeal hereditaments whatsoever; and also all incorporeal hereditaments which savour of the realty, that is, which issue out of corporeal ones, or which concern, or are annexed to, or may be exercised within the same; as, rents, estovers, commons, and the like. Also offices and dignities, which concern lands, or have relation to fixed and certain places, may be entailed [q]. But mere personal chattels, which savour not all of the realty, cannot be entailed. Neither can an office, which merely relates to such personal chattels; nor an annuity, which charges only the person, and not the lands of the grantor. But in these last, if granted to a man and the heirs of his body, the grantee hath still a fee-conditional at common law, as before the statute; and by his alienation (after issue born) may bar the heir or reversioner [r]. An estate to a man and his heirs for another's life cannot be entailed [s]: for this is strictly no estate of inheritance (as will appear hereafter), and therefore not within the statute *de donis*. Neither can a copyhold estate be entailed by virtue of the *statute*; for that would tend to encroach upon and restrain the will of the lord: but, by the *special custom* of the manor, a copyhold may be limited to the heirs of the body [t]: for here the custom ascertains and interprets the lord's will. (8)

[n] 2 Inst. 335.
[o] § 13.
[p] 1 Inst. 19, 20.
[q] 7 Rep. 33.
[r] Co. Litt. 19, 20.
[s] 2 Vern. 225.
[t] 3 Rep. 8.

(8) It may be as well to state here, the general rule which was laid down in Heydon's case, 3 Rep. 8. as to acts of parliament couched in general terms, affecting copyholds or not. "When an act of parliament doth alter the service, tenure, interest of the land, or other thing, in prejudice of the lord, or of the custom of the manor, or in prejudice of the tenant, there the general

NEXT, as to the several *species* of estates-tail, and how they are respectively created. Estates-tail are either *general* or *special*. Tail-general is where lands and tenements are given to one, and the *heirs of his body begotten*: which is called tail-general, because, how often soever such donee in tail be married, his issue in general by all and every such marriage is, in successive order, capable of inheriting the estate-tail, *per formam doni*[u]. Tenant in tail-special is where the gift is restrained to certain heirs of the donee's body, and does not go to all of them in general. And this may happen several ways[w]. I shall instance in only one; as where lands and [114] tenements are given to a man and the *heirs of his body, on Mary his now wife to be begotten*: here no issue can inherit, but such special issue as is engendered between them two; not such as the husband may have by another wife: and therefore it is called special tail. And here we may observe, that the words of inheritance (to him and his *heirs*) give him an estate in fee: but they being heirs *to be by him begotten*, this makes it a fee-tail; and the person being also limited, on whom such heirs shall be begotten, (viz. *Mary his present wife*) this makes it a fee-tail special.

ESTATES, in general and special tail, are farther diversified by the distinction of sexes in such entails; for both of them may either be in tail *male* or tail *female*. As if lands be given to a man, and his *heirs male of his body begotten*; this is an estate in tail male general; but if to a man and the heirs *female of his body on his present wife begotten*, this is an estate in tail female special. And, in case of an entail male, the heirs female shall never inherit, nor any derived from them; nor, *è converso*, the heirs male, in case of a gift in tail female[x]. Thus, if the donee in tail male hath a daughter, who dies leaving a son, such grandson in this case cannot inherit the estate-tail; for he cannot deduce his descent wholly by heirs male[y]. And as the heir male must convey his descent wholly

[u] Litt. § 14, 15.
[w] *Ibid.* § 16. 26, 27, 28, 29.
[x] *Ibid.* § 21, 22.
[y] *Ibid.* § 24.

general words of such act of parliament shall not extend to copyholds; but when an act of parliament is generally made for the good of the weal public, and no prejudice can accrue by reason of alteration of any interest, service, tenure, or custom of the manor, there many times copyhold and customary estates are within the general purview of such acts."

by males, so must the heir female wholly by females. And therefore if a man hath two estates-tail, the one in tail male, the other in tail female; and he hath issue a daughter, which daughter hath issue a son; this grandson can succeed to neither of the estates; for he cannot convey his descent wholly either in the male or female line[z].

As the word *heirs* is necessary to create a fee, so in farther limitation of the strictness of the feodal donation, the word *body*, or some other words of procreation, are necessary to make it a fee-tail, and ascertain to what heirs in particular
[115] the fee is limited. If, therefore, either the words of inheritance or words of procreation be omitted, albeit the others are inserted in the grant, this will not make an estate-tail. As, if the grant be to a man and his *issue of his body*, to a man and his *seed*, to a man and his *children*, or *offspring*; all these are only estates for life, there wanting the words of inheritance, his heirs[a]. So, on the other hand, a gift to a man, and his *heirs male*, or *female*, is an estate in fee-simple, and not in fee-tail; for there are no words to ascertain the body out of which they shall issue[b]. Indeed, in last wills and testaments, wherein greater indulgence is allowed, an estate-tail may be created by a devise to a man and his *seed*, or to a man and his *heirs male*; or by other irregular modes of expression[c].

There is still another species of entailed estates, now indeed grown out of use, yet still capable of subsisting in law; which are estates *in libero maritagio*, or *frankmarriage*. These are defined[d] to be, where tenements are given by one man to another, together with a wife, who is the daughter or cousin of the donor, to hold in frankmarriage. Now by such gift, though nothing but the word *frankmarriage* is expressed, the donees shall have the tenements to them, and the heirs of their two bodies begotten; that is, they are tenants in special tail. For this one word, *frankmarriage*, does *ex vi termini* not only create an inheritance, like the word *frankalmoign*, but likewise limits that inheritance; supplying not only words

[z] Co. Litt. 25.
[a] *Ibid.* 20.
[b] Litt. § 31. Co. Litt. 27.
[c] Co. Litt. 9 27.
[d] Litt. § 17.

of descent, but of procreation also. Such donees in frank-marriage are liable to no service but fealty; for a rent reserved thereon is void, until the fourth degree of consanguinity be past between the issues of the donor and donee[e]. (9)

THE *incidents* to a tenancy in tail, under the statute Westm. 2. are chiefly these[f]: 1. That a tenant in tail may commit *waste* on the estate-tail, by felling timber, pulling down houses, or the like, without being impeached, or called to account for the same. 2. That the wife of the tenant in tail shall have her *dower*, or thirds, of the estate-tail. 3. That the husband of a female tenant in tail may be tenant by the *curtesy* of the estate-tail. 4. That an estate-tail may be *barred*, or destroyed by a fine, by a common recovery, or by lineal warranty descending with assets to the heir. All which will hereafter be explained at large. [116]

THUS much for the nature of estates-tail: the establishment of which family law (as it is properly styled by Pigott[g]) occasioned infinite difficulties and disputes[h]. Children grew disobedient when they knew they could not be set aside: farmers were ousted of their leases made by tenants in tail; for, if such leases had been valid, then under colour of long leases the issue might have been virtually disinherited; creditors were defrauded of their debts; for, if tenant in tail

[e] Litt. § 19, 20.
[f] Co. Litt. 224.
[g] Com. Recov. 5.
[h] 1 Rep. 131.

(9) Though the definition of this estate implies that the land and the woman were to be given together, yet it seems admitted that the land might be given after marriage as well as before. Co. Litt. 21., and Mr. Hargrave's note. The reason assigned by Littleton for the limitation to the fourth degree is, that after that be passed, the issues of the donor, and the issues of the donee, might, by the law of holy church, intermarry. Whether the woman was daughter or cousin of the donor, from him to her was reckoned but one degree; so that in various cases, the actual distance of the fourth degree must of course have been very different. When the term was passed, the general rule respecting tenants in tail applied, in the absence of any special reservation, that they held *of their donor* by the same services by which he held over of his next immediate lord. Litt. s. 19—20. The student will observe, that the statute of *Quia Emptores* extended only to cases where a fee-simple was transferred, and therefore the common law rule applied, that a grantee should hold of his grantor.

could have charged his estate with their payment, he might also have defeated his issue, by mortgaging it for as much as it was worth: innumerable latent entails were produced to deprive purchasers of the lands they had fairly bought; of suits in consequence of which our antient books are full: and treasons were encouraged; as estates-tail were not liable to forfeiture, longer than for the tenant's life. So that they were justly branded, as the source of new contentions, and mischiefs unknown to the common law; and almost universally considered as the common grievance of the realm[i]. But as the nobility were always fond of this statute, because it preserved their family estates from forfeiture, there was little hope of procuring a repeal by the legislature, and therefore, by the connivance of an active and politic prince, a method was devised to evade it.

About two hundred years intervened between the making of the statute *de donis*, and the application of common recoveries to this intent, in the twelfth year of Edward IV.; which were then openly declared by the judges to be a sufficient bar of an estate-tail[k]. For though the courts had, so long before as the reign of Edward III. very frequently hinted their opinion that a bar might be effected upon these principles[l], yet it was never carried into execution; till Edward IV. observing[m] (in the disputes between the houses of York and Lancaster) how little effect attainders for treason had on families, whose estates were protected by the sanctuary of entails, gave his countenance to this proceeding, and suffered Taltarum's case to be brought before the court[n]: wherein, in consequence of the principles then laid down, it was in effect determined, that a common recovery suffered by tenant in tail should be an effectual destruction thereof. What common recoveries are, both in their nature and consequences, and why they are allowed to be a bar to the estate-tail, must be reserved to a subsequent inquiry. At present I shall only say, that they are fictitious proceedings, introduced by a kind

[117]

[i] Co. Litt. 19. Moor, 156. 10 Rep. 38.

[k] 1 Rep. 131. 6 Rep. 40.

[l] 10 Rep. 37, 38.

[m] Pigott. 8.

[n] Year-book. 12 Ed. IV. 14. 19. Fitz. *Abr. tit. faux recov.* 20 Bro. *Abr. ibid.* 30. *tit. recov. in value*, 19. *tit. taile*, 36.

of *pia fraus*, to elude the statute *de donis*, which was found so intolerably mischievous, and which yet one branch of the legislature would not then consent to repeal: and that these recoveries, however clandestinely introduced, are now become by long use and acquiescence a most common assurance of lands; and are looked upon as the legal mode of conveyance, by which tenant in tail may dispose of his lands and tenements: so that no court will suffer them to be shaken or reflected on, and even acts of parliament[o] have by a sidewind countenanced and established them.

This expedient having greatly abridged estates-tail with regard to their duration, others were soon invented to strip them of other privileges. The next that was attacked was their freedom from forfeitures for treason. For, notwithstanding the large advances made by recoveries, in the compass of about threescore years, towards unfettering these inheritances, and thereby subjecting the lands to forfeiture, the rapacious prince then reigning, finding them frequently resettled in a similar manner to suit the convenience of families, [118] had address enough to procure a statute[p], whereby all estates of inheritance (under which general words estates-tail were covertly included) are declared to be forfeited to the king upon any conviction of high treason.

The next attack which they suffered in order of time, was by the statute 32 Hen. VIII. c. 28. whereby certain leases made by tenants in tail, which do not tend to the prejudice of the issue, were allowed to be good in law, and to bind the issue in tail. But they received a more violent blow, in the same session of parliament, by the construction put upon the statute of fines[q], by the statute 32 Hen. VIII. c. 36., which declares a fine duly levied by tenant in tail to be a complete bar to him and his heirs, and all other persons claiming under such entail. This was evidently agreeable to the intention of Henry VII., whose policy it was (before common recoveries had obtained their full strength and authority) to lay the road

[o] 11 Hen. VII. c. 20. 7 Hen. VIII. c. 4. 34 & 35 Hen. VIII. c. 20. 14 Eliz. c. 8. 4 & 5 Ann. c. 16. 14 Geo. II. c. 20.

[p] 26 Hen. VIII. c. 13.

[q] 4 Hen. VII. c. 24.

as open as possible to the alienation of landed property, in order to weaken the overgrown power of his nobles. But as they, from the opposite reasons, were not easily brought to consent to such a provision, it was therefore couched, in his act, under covert and obscure expressions. And the judges, though willing to construe that statute as favourably as possible for the defeating of entailed estates, yet hesitated at giving fines so extensive a power by mere implication, when the statute *de donis* had expressly declared, that they should *not* be a bar to estates-tail. But the statute of Henry VIII., when the doctrine of alienation was better received, and the will of the prince more implicitly obeyed than before, avowed and established that intention. Yet, in order to preserve the property of the crown from any danger of infringement, all estates-tail created by the crown, and of which the crown has the reversion, are excepted out of this statute. And the same was done with regard to common recoveries, by the statute 34 & 35 Hen. VIII. c. 20. which enacts, that no feigned recovery had against tenants in tail, where the estate was created
[119] by the crown[r], and the remainder or reversion continues still in the crown, shall be of any force and effect. Which is allowing, indirectly and collaterally, their full force and effect with respect to ordinary estates-tail, where the royal prerogative is not concerned.

Lastly, by a statute of the succeeding year[s], all estates-tail are rendered liable to be charged for payment of debts due to the king by record or special contract; as since, by the bankrupt laws[t], they are also subjected to be sold for the debts contracted by a bankrupt. And, by the construction put on the statute 43 Eliz. c. 4. an appointment[u] by tenant in tail of the lands entailed, to a charitable use, is good without fine or recovery.

Estates-tail, being thus by degrees unfettered, are now reduced again to almost the same state, even before issue born, as conditional fees were in at common law, after the condition was performed, by the birth of issue. For, first, the tenant in tail is now enabled to alienc his lands and tenements,

[r] Co. Litt. 372.
[s] 33 Hen. VIII. c. 39. § 75.
[t] Stat. 21 Jac. I. c. 19.
[u] 2 Vern. 453. Chan. Prec. 16.

by fine, by recovery, or by certain other means; and thereby to defeat the interest as well of his own issue, though unborn, as also of the reversioner, except in the case of the crown: secondly, he is now liable to forfeit them for high treason: and lastly, he may charge them with reasonable leases, and also with such of his debts as are due to the crown on specialties, or have been contracted with his fellow-subjects in a course of extensive commerce.

CHAPTER THE EIGHTH.

OF FREEHOLDS, NOT OF INHERITANCE.

WE are next to discourse of such estates of freehold, as are not of inheritance, but *for life* only. And of these estates for life, some are *conventional*, or expressly created by the acts of the parties; others merely *legal*, or created by construction and operation of law[a]. We will consider them both in their order.

I. Estates for life, expressly created by deed or grant (which alone are properly conventional), are where a lease is made of lands or tenements to a man, to hold for the term of his own life, or for that of any other person, or for more lives than one: in any of which cases he is styled tenant for life; only when he holds the estate by the life of another, he is usually called tenant *pur auter vie*[b]. These estates for life are, like inheritances, of feodal nature; and were, for some time, the highest estate that any man could have in a feud, which (as we have before seen[c]) was not in it's original hereditary. They are given or conferred by the same feodal rights and solemnities, the same investiture or livery of seisin, as fees themselves are; and they are held by fealty, if demanded, and such conventional rents and services as the lord or lessor, and his tenant or lessee, have agreed on.

[121] Estates for life may be created, not only by the express words before mentioned, but also by a general grant, without defining or limiting any specific estate. As, if one grants to

[a] Wright, 190. [b] Litt. § 56. [c] pag. 55.

A. B. the manor of Dale, this makes him tenant for life[d]. For though, as there are no words of inheritance or *heirs*, mentioned in the grant, it cannot be construed to be a fee, it shall, however, be construed to be as large an estate as the words of the donation will bear, and therefore an estate for life. Also such a grant at large, or a grant for term of life generally, shall be construed to be an estate for the life *of the grantee*[e]; in case the grantor hath authority to make such grant: for an estate for a man's own life is more beneficial and of a higher nature than for any other life; and the rule of law is, that all grants are to be taken most strongly against the grantor[f], unless in the case of the king.

SUCH estates for life will, generally speaking, endure as long as the life for which they are granted: but there are some estates for life, which may determine upon future contingencies, before the life, for which they are created, expires. As, if an estate be granted to a woman during her widowhood, or to a man until he be promoted to a benefice: in these, and similar cases, whenever the contingency happens, when the widow marries, or when the grantee obtains a benefice, the respective estates are absolutely determined and gone[g]. Yet while they subsist, they are reckoned estates for life; because, the time for which they will endure being uncertain, they may by possibility last for life, if the contingencies upon which they are to determine do not sooner happen. And moreover, in case an estate be granted to a man for his life, generally, it may also determine by his *civil* death: as if he enters into a monastery, whereby he is dead in law[h]: for which reason in conveyances the grant is usually made "for "the term of a man's *natural* life;" which can only determine by his *natural* death[i].

THE *incidents* to an estate for life are principally the following; which are applicable not only to that species of tenants for life, which are expressly created by deed; but also to those which are created by act and operation of law. [122]

[d] Co. Litt. 42.
[e] *Ibid.*
[f] *Ibid.* 36.
[g] Co. Litt. 42, 3 Rep. 20.
[h] 2 Rep 48.
[i] See Vol. I. p. 132.

1. Every tenant for life, unless restrained by covenant or agreement, may of common right take upon the land demised to him reasonable *estovers*[k] or *botes*[l]. For he hath a right to the full enjoyment and use of the land, and all its profits, during his estate therein. But he is not permitted to cut down timber or do other waste upon the premises[m] (1): for the destruction of such things as are not the temporary profits of the tenement, is not necessary for the tenant's complete enjoyment of his estate; but tends to the permanent and lasting loss of the person entitled to the inheritance.

2. Tenant for life, or his representatives, shall not be prejudiced by any sudden determination of his estate, because such a determination is contingent and uncertain[n]. (2) Therefore if a tenant for his own life sows the lands, and dies before harvest, his executors shall have the *emblements*, or profits of the crop: for the estate was determined by the *act of God*, and it is a maxim in the law, that *actus Dei nemini facit injuriam*. The representatives, therefore, of the tenant for life shall have the emblements to compensate for the labour and expence of tilling, manuring, and sowing the lands; and also for the encouragement of husbandry, which being a public benefit, tending to the increase and plenty of provisions, ought to have the utmost security and privileges that the law can give it. Wherefore by the feodal law, if a tenant for life died between the beginning of September and the end of February, the lord, who was entitled to the reversion, was also entitled to the profits of the whole year; but if he died between the beginning of March and the end of August, the

[k] See p. 35.
[l] Co. Litt. 41.
[m] *Ibid.* 53.
[n] *Ibid.* 55.

(1) He may cut down timber for necessary repairs, and at seasonable times. Co. Litt. 53. See post, p. 283.

(2) A sudden determination, in the sense in which it is here used, is that the happening of which is contingent and uncertain; and therefore the latter part of the sentence can hardly be assigned as a reason for the former. The reason on which the doctrine of emblements is founded may be collected from what follows; or in the words of Lord Coke, "lest the "ground should be unmanured, which should be hurtful to the common-"wealth, he shall reap the crop, which he sowed, in peace." Co. Litt. 55. a.

heirs of the tenant received the whole[o]. From hence our law of emblements seems to have been derived, but with very considerable improvements. So it is also, if a man be tenant for the life of another, and *cestuy que vie*, or he on whose life the land is held, dies after the corn sown, the tenant *pur auter vie* shall have the emblements. The same is also the rule, if a life-estate be determined by the *act of law*. Therefore if a lease be made to husband and wife during coverture, (which gives them a determinable estate for life,) and the husband sows the land, and afterwards they are divorced *a vinculo matrimonii*, the husband shall have the emblements in this case; for the sentence of divorce is the act of law[p]. But if an estate for life be determined by the tenant's *own act*, (as, by forfeiture for waste committed; or, if a tenant during widowhood thinks proper to marry,) in these, and similar cases, the tenants, having thus determined the estate by their own acts, shall not be entitled to take the emblements[q]. The doctrine of emblements extends not only to corn sown, but to roots planted, or other annual artificial profit, but it is otherwise of fruit-trees, grass, and the like; which are not planted annually at the expence and labour of the tenant, but are either a permanent or natural profit of the earth[r]. For when a man plants a tree, he cannot be presumed to plant it in contemplation of any present profit; but merely with a prospect of it's being useful to himself in future, and to future successions of tenants. The advantages also of emblements are particularly extended to the parochial clergy by the statute 28 Hen. VIII. c. 11. For all persons, who are presented to any ecclesiastical benefice, or to any civil office, are considered as tenants for their own lives, unless the contrary be expressed in the form of donation. (3)

[o] *Feud. l. 2. t. 28.*
[p] *5 Rep. 116.*
[q] Co. Litt. *55.*
[r] Co. Litt. *55, 56.* 1 Roll. Abr. 728.

(3) The provision of the statute is, that in case any incumbent happens to die, and before his death hath caused any of his glebe lands to be manured and sown at his proper costs and charges with any corn or grain, then, in that case, all and every of the same incumbents may make and declare their testaments of all their profits of the corn growing upon the said glebe lands so manured and sown. s. 6.

3. A third incident to estates for life relates to the under-tenants, or lessees. For they have the same, nay greater indulgences than the lessors, the original tenants for life. The same; for the law of estovers and emblements with
[124] regard to the tenant for life, is also law with regard to his under-tenant, who represents him and stands in his place[s]: and greater; for in those cases where tenant for life shall not have the emblements, because the estate determines by his own act, the exception shall not reach his lessee, who is a third person. As in the case of a woman who holds *durante viduitate*; her taking husband is her own act, and therefore deprives her of the emblements; but if she leases her estate to an under-tenant, who sows the land, and she then marries, this her act shall not deprive the tenant of his emblements, who is a stranger, and could not prevent her[t]. The lessees of tenants for life had also at the common law another most unreasonable advantage; for at the death of their lessors, the tenants for life, these under-tenants might if they pleased quit the premises, and pay no rent to any body for the occupation of the land since the last quarter-day, or other day assigned for payment of rent[u]. (4) To remedy which it is now enacted[v], that the executors or administrators of tenant for life, on whose death any lease determined, shall recover of the lessee a rateable proportion of rent from the last day of payment to the death of such lessor.

11. The next estate for life is of the legal kind, as contra-distinguished from conventional; viz. that of tenant *in tail after possibility of issue extinct*. This happens where one is tenant in special tail: and a person from whose body the issue was to spring, dies without issue; or, having left issue,

[s] Co. Litt. 55.
[t] Cro. Eliz. 461. 1 Roll. Abr. 727.
[u] 10 Rep. 127.
[v] Stat. 11 Geo. II. c. 19. § 15.

(4) The reason was, that the contract for rent being entire, and nothing being due till the day fixed for payment, the representatives of the lessor could have no right of action, for he had none, nothing being due when he died; and the reversioners or remainder-men could have no right of action, for the lease ending with the life of the lessor, never had any existence at all as to them; the lessee was never *their* tenant, never occupied *their* lands.

that issue becomes extinct: in either of these cases the surviving tenant in special tail becomes tenant in tail after possibility of issue extinct. As where one has an estate to him and his heirs on the body of his present wife to be begotten, and the wife dies without issue[w]: in this case the man has an estate-tail, which cannot possibly descend to any one; and therefore the law makes use of this long periphrasis, as absolutely necessary to give an adequate idea of his estate. For if it had called him barely *tenant in fee-tail special*, that would not have distinguished him from others; and besides, [125] he has no longer an estate of inheritance or fee[x], for he can have no heirs capable of taking *per formam doni*. Had it called him *tenant in tail without issue*, this had only related to the present fact, and would not have excluded the possibility of future issue. Had he been stiled *tenant in tail without possibility of issue*, this would exclude time past as well as present, and he might under this description never have had any possibility of issue. No definition therefore could so exactly mark him out, as this of tenant *in tail after possibility of issue extinct*, which (with a precision peculiar to our own law) not only takes in the possibility of issue in tail, which he once had, but also states that this possibility is now extinguished and gone.

This estate must be created by the act of God, that is, by the death of that person out of whose body the issue was to spring: for no limitation, conveyance, or other human act can make it. For, if land be given to a man and his wife, and the heirs of their two bodies begotten, and they are divorced *a vinculo matrimonii*, they shall neither or them have this estate, but be barely tenants for life, notwithstanding the inheritance once vested in them[y]. A possibility of issue is always supposed to exist in law, unless extinguished by the death of the parties; even though the donees be each of them an hundred years old[z].

This estate is of an amphibious nature, partaking partly of an estate-tail, and partly of an estate for life. The tenant is, in truth, only tenant for life, but with many of the privileges

[w] Litt. § 32.
[x] 1 Roll. Rep. 184. 11 Rep. 80.
[y] Co. Litt. 28.
[z] Litt. § 34. Co. Litt. 28.

of a tenant in tail; as not to be punishable for waste, &c.[a]; or, he is tenant in tail, with many of the restrictions of a tenant for life; as to forfeit his estate, if he alienes it in fee-simple[b]: whereas such alienation by tenant in tail, though voidable by the issue, is no forfeiture of the estate to the reversioner: who is not concerned in interest, till all possi-
[126] bility of issue be extinct. But, in general, the law looks upon this estate as equivalent to an estate for life only; and, as such, will permit this tenant to exchange his estate with a tenant for life, which exchange can only be made, as we shall see hereafter, of estates that are equal in their nature. (5)

III. Tenant *by the curtesy of England*, is where a man marries a woman seised of an estate of inheritance, that is, of lands and tenements in fee-simple or fee-tail; and has by her issue, born alive, which was capable of inheriting her estate. In this case he shall, on the death of his wife, hold the lands for his life, as tenant by the curtesy of England[c].

This estate, according to Littleton, has it's denomination, because it is used within the realm of England only; and it is said in the Mirrour[d] to have been introduced by king Henry the first; but it appears also to have been the established law of Scotland, wherein it was called *curialitas*[e]; so that probably our word *curtesy* was understood to signify rather an attendance upon the lord's *court* or *curtis*, (that is, being his vasal or tenant,) than to denote any peculiar favour belonging to this island. And therefore it is laid down[f] that by having

[a] Co. Litt. 27.
[b] *Ibid.* 28.
[c] Litt. § 35. 52.
[d] c. 1. § 3.
[e] Craig. *l.* 2. *c.* 19. § 4.
[f] Litt. § 90. Co. Litt. 30. 67.

(5) This tenant has these privileges in respect of the inheritance that once was in him, as tenant in tail (who at common law, and before the statute *de donis*, it will be remembered, was tenant in fee), and he cannot transfer them with his estate to any other person; his assignee will be bare tenant for life. Being dispunishable for waste upon this principle, he may cut timber, and will have a property in it when cut; but like the tenant for life, who by express provision of the parties is made dispunishable for waste, a court of equity will restrain him from *malicious* waste. Co. Litt. 28. *Williams* v. *Williams*, 15 Ves. Rep. 427.

issue, the husband shall be entitled to do homage to the lord, for the wife's lands, alone: whereas, before issue had, they must both have done it together. It is likewise used, in Ireland, by virtue of an ordinance of king Henry III.[g] It also appears[h] to have obtained in Normandy; and was likewise used among the antient Almains or Germans[i]. And yet it is not generally apprehended to have been a consequence of feodal tenure[k], though I think some substantial feodal reasons may be given for it's introduction. For if a woman seised of lands hath issue by her husband, and dies, the husband is the natural guardian of the child, and as such is in reason entitled to the profits of the lands in order to maintain it; for which reason the heir apparent of a tenant by the curtesy could [127] not be in ward to the lord of the fee, during the life of such tenant[l]. As soon therefore as any child was born, the father began to have a permanent interest in the lands, he became one of the *pares curtis*, did homage to the lord, and was called tenant by the curtesy *initiate*; and this estate being once vested in him by the birth of the child, was not suffered to determine by the subsequent death or coming of age of the infant.

THERE are four requisites necessary to make a tenancy by the curtesy; marriage, seisin of the wife, issue, and death of the wife[m]. 1. The marriage must be canonical and legal 2. The seisin of the wife must be an actual seisin, or possession of the lands; not a bare right to possess, which is a seisin in law, but an actual possession, which is a seisin in deed. And therefore a man shall not be tenant by the curtesy of a remainder or reversion. But of some incorporeal hereditaments a man may be tenant by the curtesy, though there have been no actual seisin of the wife: as in case of an advowson, where the church has not become void in the lifetime of the wife: which a man may hold by the curtesy, because it is impossible ever to have actual seisin of it, and *impotentia excusat legem*[n]. If the wife be an ideot, the husband shall not be tenant by the curtesy of her lands; for the king

[g] *Pat.* 11 *H. III. m.* 30. in 2 Bac. Abr. 659.
[h] *Grand Coustum. c.* 119.
[i] Lindenbrog. *LL. Alman. t.* 92.
[k] Wright, 194.
[l] F. N. B. 143.
[m] Co. Litt 30.
[n] *Ibid.* 29.

by prerogative is entitled to them, the instant she herself has any title: and since she could never be rightfully seised of the lands, and the husband's title depends entirely upon her seisin, the husband can have no title as tenant by the curtesy °. (6) 3. The issue must be born alive. Some have had a

° Co. Litt. 30. Plowd. 268.

---

(6) The words "*actual* seisin or possession of the lands" are satisfied by the possession of a tenant for years; for if the land is demised for a term of years, his possession is the possession of the wife; and there may be curtesy, though she dies before entry, or even receipt of rent. Co. Litt. 29. Hargr. n. 162. But if the lands were not let, and descended on the wife, who died before entry, there could be no curtesy. Co. Litt. 29.

With respect to the case of the advowson, if the author means, as his words seem to import, that a husband shall be tenant by the curtesy of it under the circumstances stated, because, from the nature of the hereditament, it is impossible to have actual seisin of it at any time, he seems not to be warranted by the law or his authority. Presentation gives seisin of an advowson; and all that Lord Coke says is, that he shall be tenant, even though there has been no vacancy, because he could by no industry attain to any other seisin; that is, he could not bring about a vacancy at any time that he pleased.

The position which follows respecting the husband of an ideot, has been questioned. Lord Coke's argument, as well as that in Plowden, is, that the titles of the tenant by curtesy, and of the king, begin at one instant, (the office which finds her an ideot, having relation back to her first seisin), and then that the title of the king shall be preferred. Upon this it has been remarked, that there is not any such concourse of titles; the husband's title not being consummate till the wife's death, when the king's title determines. Co. Litt. 30. Hargr. n. 175. The argument in the text, that an ideot can never be rightfully seised of lands, is directly at variance with that just stated, which assumes the seisin of the ideot. Lord Coke reckons ideots among those who have power to purchase and retain lands or tenements, Co. Litt. 3. b., or to be grantees of a copyhold estate, Co. Cop. s. 35.; indeed the old writ *de idiotâ inquirendo, et examinando*, proceeded upon the same assumption, and the king took the custody of the lands as of lands of which the ideot had been seised, F. N. B. 232

But the same conclusion may be rested upon the principle, that there can have been no valid marriage with an ideot; a principle which it is the more remarkable that the author should have overlooked here, as only three pages later he makes use of it to exclude the wife of an ideot from dower.

In Vol. I. p. 302. an ideot is defined to be one who hath had no understanding *from his nativity:* if that definition be correct, there can be no question but that such a person could never contract a valid marriage. But I imagine that a person born sane, might from external injury, or internal

notion that it must be heard to cry; but that is a mistake. Crying indeed is the *strongest* evidence of it's being born alive; but it is not the *only* evidence[p]. The issue also must be born during the life of the mother; for if the mother dies in labour, and the Cæsarean operation is performed, the husband in this case shall not be tenant by the curtesy; because, at the instant of the mother's death, he was clearly not entitled, as having had no issue born, but the land descended to the child, while he was yet in his mother's womb; and the estate being once so vested, shall not afterwards be taken from him[q]. In gavel-kind lands, a husband may be tenant by the curtesy, without having any issue[r]. But in general there must be issue born: and such issue as is also capable of inheriting the mother's estate[s]. Therefore if a woman be tenant in tail *male*, and hath only a *daughter* born, the husband is not thereby entitled to be tenant by the curtesy; because such issue female can never inherit the estate in tail male[t]. And this seems to be the principal reason, why the husband cannot be tenant by the curtesy of any lands of which the wife was not actually seised; because, in order to entitle himself to such estate, he must have begotten issue that may be heir to the wife: but no one, by the standing rule of law, can be heir to the ancestor of any land, whereof the ancestor was not actually seised; and therefore as the husband hath never begotten any issue that can be heir to those lands, he shall not be tenant of them by the curtesy[u]. And hence we may observe, with how much nicety and consideration the old rules of law were framed; and how closely they are connected and interwoven together, supporting, illustrating, and demonstrating one another. The time [128]

[p] Dyer, 25. 8 Rep. 34.
[q] Co. Litt. 29.
[r] *Ibid.* 30.
[s] Litt. § 52.
[t] Co. Litt. 29.
[u] *Ibid.* 40.

---

ternal disease gradually aggravated, be reduced to ideotcy as opposed to lunacy, or madness; if such a case would come within the legal notion of ideotcy, still a marriage contracted while the person was sane, and seisin then had, with issue, ought on principle to entitle the husband to curtesy, because in such a case no one of the principles of exclusion would apply; the husband's title would be prior to the king's, there would have been sufficient seisin, and the marriage would not have been invalid.

when the issue was born is immaterial, provided it were during the coverture; for, whether it were born before or after the wife's seisin of the lands, whether it be living or dead at the time of the seisin, or at the time of the wife's decease, the husband shall be tenant by the curtesy [w]. The husband by the birth of the child becomes (as was before observed) tenant by the curtesy *initiate* [x], and may do many acts to charge the lands, but his estate is not *consummate* till the death of the wife: which is the fourth and last requisite to make a complete tenant by the curtesy [y].

[129] IV. Tenant in *dower* is where the husband of a woman is seised of an estate of inheritance, and dies; in this case, the wife shall have the third part of all the lands and tenements whereof he was seised at any time during the coverture, to hold to herself for the term of her natural life [z].

Dower is called in Latin by the foreign jurists *doarium*, but by Bracton and our English writers *dos:* which among the Romans signified the marriage portion, which the wife brought to her husband; but with us is applied to signify this kind of estate, to which the civil law, in its original state, had nothing that bore a resemblance: nor indeed is there any thing in general more different, than the regulation of landed property according to the English and Roman laws. Dower out of lands seems also to have been unknown in the early part of our Saxon constitution; for in the laws of king Edmnod [a], the wife is directed to be supported wholly out of the personal estate. Afterwards, as may be seen in gavelkind tenure, the widow became entitled to a conditional estate in one half of the lands; with a proviso that she remained chaste and unmarried [b]; as is usual also in copyhold dowers, or free bench. Yet some [c] have ascribed the introduction of dower to the Normans, as a branch of *their* local tenures; though we cannot expect any feodal reason for it's invention, since it was not a part of the pure, primitive, simple law of feuds, but was first of all introduced into that system (wherein it was

[w] Co. Litt. 29.
[x] *Ibid.* 30.
[y] *Ibid.*
[z] Litt. § 36.
[a] Wilk. 75.
[b] Somner. Gavelk. 51. Co. Litt. 33. Bro. *Dower*, 70.
[c] Wright. 192.

called *triens*, *tertia*[d], and *dotalitium*) by the emperor Frederick the second[e]; who was contemporary with our king Henry III. It is possible, therefore, that it might be with us the relic of a Danish custom: since, according to the historians of that country, dower was introduced into Denmark by Swein, the father of our Canute the great, out of gratitude to the Danish ladies, who sold all their jewels to ransom him when taken prisoner by the Vandals[f]. However this be, the reason which our law gives for adopting it, is a very plain and sensible one; for the sustenance of the wife, and the nurture and education of the younger children[g]. (7)

In treating of this estate, let us, first, consider *who* may be endowed; secondly, of *what* she may be endowed; thirdly, the manner *how* she shall be endowed; and fourthly, how dower may be *barred* or prevented.

1. Who may be endowed. She must be the actual wife of the party at the time of his decease. If she be divorced *a vinculo matrimonii*, she shall not be endowed; for *ubi nullum matrimonium, ibi nulla dos*[h]. But a divorce *a mensa et thoro* only doth not destroy the dower[i]; no, not even for adultery itself by the common law[k]. Yet now by the statute Westm. 2.[l] if a woman voluntarily leaves (which the law calls eloping from) her husband, and lives with an adulterer, she shall lose her dower, unless her husband be voluntarily

[d] Crag. *l.* 2. *t.* 22. § 9.
[e] *Ibid.*
[f] Mod. Un. Hist. xxxii. 91.
[g] Bract *l.* 2. *c.* 39. Co. Litt. 30.
[h] Bract *l.* 2. *c.* 39. § 4.
[i] Co. Litt 32.
[k] Yet, among the antient Goths, an adultress was punished by the loss of her *dotalun et trientis ex bonis mobilibus viri* (Stiernh. *l.* 3. *c.* 2.)
[l] 13 Edw. I. c. 34.

(7) The following note is by the editor of the 11th edition of Co. Litt. The reason why the law gave the wife dower will appear, if we consider how the law stood antiently; for, by the old law, if this provision had not been made, and the party at the marriage had made no assignment of dower, the wife would have been without any provision, for the personal estates even of the richest were then very inconsiderable; and before trusts were invented, which is but lately, the husband could give his wife nothing during his own life, nor could he provide for her by will, because lands could not be devised, unless it was in some particular places by the custom, till the statute of Hen. 8. Co. Litt. 30. b.

reconciled to her. It was formerly held, that the wife of an ideot might be endowed, though the husband of an ideot could not be tenant by the curtesy[m]: but as it seems to be at present agreed, upon principles of sound sense and reason, that an ideot cannot marry, being incapable of consenting to any contract, this doctrine cannot now take place. By the antient law the wife of a person attainted of treason or felony could not be endowed; to the intent, says Staunforde[n], that if the love of a man's own life cannot restrain him from such atrocious acts, the love of his wife and children may; though Britton[o] gives it another turn: *viz.* that it is presumed the wife was privy to her husband's crime. However, the statute 1 Edw. VI. c. 12. abated the rigour of the com-
[131] mon law in this particular, and allowed the wife her dower. But a subsequent statute[p] revived this severity against the widows of traitors, who are now barred of their dower (except in the case of certain modern treasons relating to the coin[q]), but not the widows of felons. An alien also cannot be endowed, unless she be queen consort; for no alien is capable of holding lands[r]. (8) The wife must be above nine years old at her husband's death, otherwise she shall not be endowed[s]: though in Bracton's time the age was indefinite, and dower was then only due "*si uxor possit dotem promereri, et virum sustinere*[t]."

2. We are next to enquire, of what a wife may be endowed. And she is now by law entitled to be endowed of all lands and tenements, of which her husband was seised in fee-

[m] Co. Litt. 31.
[n] P. C. b. 3. c. 33.
[o] c. 110.
[p] 5 & 6 Edw. VI. c. 11.
[q] Stat. 5 Eliz. c. 11. 18 Eliz. c. 1. 8 & 9 W. III. c. 26. 15 & 16 Geo. II. c. 28.
[r] Co. Litt. 31.
[s] Litt. § 36.
[t] *l.* 2. *c.* 39. § 3.

(8) In the MSS. notes of Lord Hale, which are printed in Hargrave and Butler's Co. Litt., it is said, that by an unprinted act of parliament, passed in Henry the eighth's reign, all aliens who thenceforth should marry Englishmen by licence of the king, are enabled to demand their dower in the same manner as English women. And because this was only prospective in its operation, there is subsequently a special act to enable Beatrice countess of Arundel, born in Portugal, to demand her dower. See acc. 1 Roll. Abr. 675.

simple or fee-tail, at any time during the coverture; and of which any issue, which she might have had, might by possibility have been heir [u]. (9) Therefore, if a man seised in fee-simple, hath a son by his first wife, and after marries a second wife, she shall be endowed of his lands; for her issue might by possibility have been heir, on the death of the son by the former wife. But if there be a donee in special tail, who holds lands to him and the heirs of his body begotten on Jane his wife; though Jane may be endowed of these lands, yet if Jane dies, and he marries a second wife, that second wife shall never be endowed of the lands entailed; for no issue that she could have, could by any possibility inherit them [v]. A seisin in law of the husband will be as effectual as a seisin in deed, in order to render the wife dowable; for it is not in the wife's power to bring the husband's title to an actual seisin, as it is in the husband's power to do with regard to the wife's lands: which is one reason why he shall not be tenant by the curtesy, but of such lands whereof the wife, or he himself in her right, was actually seised in deed [w]. The seisin of the husband, for a transitory instant only, when the same act which gives him the estate conveys [132] it also out of him again (as where, by a fine, land is granted to a man, and he immediately renders it back by the same fine), (10) such a seisin will not entitle the wife to dower [x]: for

[u] Litt. § 36. 56.
[v] *Ibid.* § 53.
[w] Co. Litt. 31.
[x] Cro. Jac. 615. 2 Rep. 77. Co. Litt. 31.

(9) The word "sole" should be inserted before seised in this description, because, if the husband is seised jointly with another person, that other person's interest being derived from the original grant to the husband and himself, is prior to the wife's claim; and therefore she shall not be endowed. Litt. s. 45. Co. Litt. 37. The principle of this rule is founded on the nature of the interest of joint-tenants, (see post, 182.) from which survivorship is a necessary consequence, and not an arbitrary rule of law. During the life of the husband, his joint-tenant's interest pervaded the *whole* of the land; now the tenant in dower would come in as tenant in common, and be entitled to hold the third of one moiety by a distinct title; the survivor's interest would therefore be changed, he would be obliged to recede entirely from that third, in which before he had a joint-interest, and he would be put to this change by one whose title was posterior to his own. The maxim of law is, that *jus accrescendi præfertur oneribus.*

(10) See post, p. 355.

the land was merely *in transitu*, and never rested in the husband; the grant and render being one continued act. But, if the land abides in him for the interval of but a single moment, it seems that the wife shall be endowed thereof[y]. (11) And, in short, a widow may be endowed of all her husband's lands, tenements, and hereditaments, corporeal or incorporeal, under the restrictions before mentioned; unless there be some special reason to the contrary. Thus, a woman shall not be endowed of a castle built for defence of the realm[z]: nor of a common without stint; for, as the heir would then have one portion of this common, and the widow another, and both without stint, the common would be doubly stocked.[a] Copyhold estates are also not liable to dower, being only estates at the lord's will; unless by the special custom of the manor, in which case it is usually called the widow's free bench[b]. (12) But, where dower is allowable, it matters not though the husband aliene the lands during the coverture; for he alienes them liable to dower[c].

[y] This doctrine was extended very far by a jury in Wales, where the father and son were both hanged in one cart, but the son was supposed to have survived the father, by appearing to struggle longest; whereby he became seised of an estate in fee by survivorship, in consequence of which seisin his widow had a verdict for her dower. (Cro. Eliz. 503.)

[z] Co Litt. 31. 3 Lev. 401.

[a] Co. Litt. 32. 1 Jon. 315.

[b] 4 Rep. 22.

[c] Co. Litt. 32.

(11) The student may reasonably be puzzled to distinguish between the "transitory instant" of one example, and the "single moment" of the other. In fact, the space of time is no essential ingredient in the case; it is the *interest* of the husband; in the first example, the cognisee of the fine takes absolutely no interest at all by the grant, he is, to use the expression of the text, (p. 364.) a mere instrument or conduit-pipe to carry an estate to the cognisor, or it may be to a stranger; he is simply to perform a contract made by himself with the cognisor, or between the cognisor and a stranger. Upon this ground it is, I conceive, that the wife would not be dowable. In the second example, the land is supposed to be abiding in the husband as his own.

(12) And as she is only dowable by custom, custom regulates entirely the extent and nature of her dower; it may be a fourth, a third, a moiety, or the whole of the land, it may be a portion only of the rent; it may last during widowhood, chaste widowhood, or for life. One very prevailing rule is, that it attaches only on the lands of which the husband *dies* seised. See Scriven on Copyholds, 86, &c.

3. NEXT, as to the manner in which a woman is to be endowed. There are now subsisting four species of dower; the fifth, mentioned by Littleton [d], *de la plus belle*, having been abolished together with the military tenures, of which it was a consequence. (13) 1. Dower by the *common law*; or that which is before described. 2. Dower by particular *custom* [e]; as that the wife should have half the husband's lands, or in some places the whole, and in some only a quarter. 3. Dower *ad ostium ecclesiae* [f]: which is where tenant in fee-simple of full age, openly at the church door, where all mar- [133] riages were formerly celebrated, after affiance made and (sir Edward Coke in his translation of Littleton, adds) troth plighted between them, doth endow his wife with the whole, or such quantity as he shall please, of his lands; at the same time specifying and ascertaining the same; on which the wife, after her husband's death, may enter without farther ceremony. 4. Dower *ex assensu patris* [g]; which is only a species of dower *ad ostium ecclesiae*, made when the husband's father is alive, and the son [and heir apparent] by his consent, expressly given, endows his wife with parcel of his father's lands. (14) In either of these cases, they must (to prevent

[d] Co. Litt. § 48, 49.
[e] Litt. § 37.
[f] *Ibid.* § 39.
[g] *Ibid.* § 40.

(13) The dower *de la plus belle* was shortly this: if a man holding lands in chivalry and in socage died leaving a widow, and an heir under fourteen, the lord was entitled to the custody of the lands holden in chivalry, and the widow, as mother, of the lands in socage; but as she would have to account for the profits of the lands so held by her, there was no provision for herself by way of dower. If then she brought a writ of dower against the lord, to be endowed from the lands holden by him, he might plead all these facts, and pray that she might be adjudged to endow herself of *the fairest* of the lands held by her as guardian. And if judgment to that effect was given, the chivalry lands during the wardship were quit of dower, and she, in the presence of her neighbours, (perhaps a jury,) endowed herself by metes and bounds of the fairest part of the socage lands, to the value of a third part of the whole of both tenements.

This dower may be considered as another of the feudal hardships, which relieved the lord in chivalry of his share of a burthen commonly incident to all lands, and threw it unfairly upon the socage lands; in other words, upon the ward.

(14) The son ought to specify and ascertain the lands, and by reason of that the wife may in this case also, enter on them after his death without farther ceremony.

frauds) be made [h] *in facie ecclesiae et ad ostium ecclesiae; non enim valent facta in lecto mortali, nec in camera, aut alibi ubi clandestina fuerint conjugia.*

It is curious to observe the several revolutions which the doctrine of dower has undergone, since its introduction into England. It seems first to have been of the nature of the dower in gavelkind before mentioned; *viz.* a moiety of the husband's lands, but forfeitable by incontinency or a second marriage. By the famous charter of Henry I., this condition of widowhood and chastity was only required in case the husband left any issue [i]: and afterwards we hear no more of it. Under Henry the second, according to Glanvil [k], the dower *ad ostium ecclesiae* was the most usual species of dower; and here, as well as in Normandy [l], it was binding upon the wife, if by her consented to at the time of marriage. Neither, in those days of feodal rigour, was the husband allowed to endow her *ad ostium ecclesiae* with more than the third part of the lands whereof he was then seised, though he might endow her with less; lest by such liberal endowments the lord should be defrauded of his wardships and other feodal profits [m]. But if no specific dotation was made at the church
[134] porch, then she was endowed *by the common law* of the third part (which was called her *dos rationabilis*) of such lands and tenements as the husband was seised of at the time of the espousals, and no other; unless he specially engaged before the priest to endow her of his future acquisitions [n]: and if the husband had no lands, an endowment in goods, chattels, or money, at the time of espousals, was a bar of any dower [o] in lands which he afterwards acquired [p]. In king John's *magna*

[h] Bracton, *l.* 2. *c.* 39. § 4.

[i] *Si mortuo viro uxor ejus remanserit et sine liberis fuerit, dotem suam habebit; —si vero uxor cum liberis remanserit, dotem quidem habebit, dum corpus suum legitime servaverit.* (*Cart. Hen. I. A.D.* 1001. Introd. to great charter, *edit. Oxon.* pag. iv.)

[k] *l.* 6. *c.* 1. & 2.

[l] *Gr. Coustum. c.* 101.

[m] Bract. *l.* 2. *c.* 39. § 6.

[n] *De questu suo.* (Glan. *ib.*) — *de terris perquisitis et perquirendis.* (Bract. *ib.*)

[o] Glanv. *l.* 6, *c.* 2.

[p] When special endowments were made *ad ostium ecclesiae*, the husband after affiance made, and troth plighted, used to declare with what specific lands he meant to endow his wife, (*quod dotem eam de tali manerio cum pertinentiis, &c.* Bract. *ibid.*) and therefore in the old York ritual (Seld. *Ux. Hebr. l.* 2. *c.* 27.) there is, at this part of the matrimonial service, the following rubric; "*sacerdos interroget dotem mulieris: et, "si terra ei in dotem detur, tunc dicatur*

carta, and the first charter of Henry III.[q], no mention is made of any alteration of the common law, in respect of the lands subject to dower: but in those of 1217, and 1224, it is particularly provided, that a widow shall be entitled for her dower to the third part of *all* such lands as the husband had held in his life-time[r]: yet in case of a specific endowment of less *ad ostium ecclesiae*, the widow had still no power to waive it after her husband's death. And this continued to be law, during the reigns of Henry III. and Edward I.[s] In Henry IV.'s time it was denied to be law, that a woman can be endowed of her husband's goods and chattels[t]: and, under Edward IV., Littleton lays it down expressly, that a woman may be endowed *ad ostium ecclesiae* with more than a third part[u]; and shall have her election, after her husband's death, to accept such dower or refuse it, and betake herself to her dower at common law[w]. Which state of uncertainty was probably the reason, that these specific dowers, *ad ostium ecclesiae* and *ex assensu patris*, have since fallen into total disuse. [135]

I PROCEED, therefore, to consider the method of endowment or assigning dower, by the common law, which is now the only usual species. By the old law, grounded on the feodal exactions, a woman could not be endowed without a fine paid to the lord: neither could she marry again without his licence; lest she should contract herself, and so convey part

"*psalmus iste, &c.*" When the wife was endowed generally (*ubi quis uxorem suam dotaverit in generali, de omnibus terris et tenementis*; Bract. *ib.*) the husband seems to have said, "with all my lands and tenements I thee endow;" and then they all became liable to her dower. When he endowed her with personalty only, he used to say, "with "all my worldly goods" (or, as the Sa- "lisbury ritual has it, *with all my* "*worldly chattel*) I thee endow;" which entitled the wife to her thirds, or *pars rationabilis*, of his personal estate, which is provided for by *magna carta*, *cap.* 22. and will be farther treated of in the concluding chapter of this book; though the retaining this last expression in our modern liturgy, if of any meaning at all, can now refer only to the right of maintenance, which she acquires during coverture, out of her husband's personalty.

[q] *A.D.* 1216. *c.* 7. *edit. Oxon.*

[r] *Assignetur autem ei pro dote sua tertia pars totius terrae mariti sui quae sua fuit in vita sua, nisi de minori dotata fuerit ad ostium ecclesiae. c.* 7. (*Ibid.*)

[s] Bract. *ubi supr.* Britton. c. 101, 102. Flet. *l.* 5. *c.* 23. § 11, 12.

[t] *P.* 7 *Hen. IV.* 13, 14.

[u] § 39. F. N. B. 150.

[w] § 41.

of the feud, to the lord's enemy[x]. This licence the lords took care to be well paid for; and, as it seems, would sometimes force the dowager to a second marriage, in order to gain the fine. But, to remedy these oppressions, it was provided, first by the charter of Henry I.[y] and afterwards by *magna carta*[z], that the widow shall pay nothing for her marriage (15); nor

[x] Mirr. c. 1. § 3.
[y] *ubi supra.*
[z] *cap.* 7.

(15) The expression in Magna Carta is *Vidua post mortem mariti sui statim et sine difficultate aliquâ habeat maritagium suum, et hæreditatem suam, nec aliquid det pro dote suâ, nec pro maritagio suo, vel pro hæreditate suâ habendâ, quam hæreditatem maritus suus, et ipsa tenuerunt simul die obitûs ipsius mariti sui.* Lord Coke, as well as the author, translates *maritagium* marriage: "Widowes are presently after the decease of their husbands without any difficulty to have their marriage (that is to marrie where they will without any licence or assent of their lords.)" 2 Inst. 16. I cannot however but think, that this interpretation is wrong. I am not aware that *maritagium* ever signifies marriage in the present popular acceptation of the term; Spelman gives it two meanings, he says, it is that portion or estate which is given to a husband with a wife, or that which a ward pays to his lord for leave to marry; by the first I take him to mean an estate given in frank marriage, by the latter, what in speaking of the incidents of tenure by knight-service, the author, at p. 70. calls "marriage, *maritagium*, as contradistinguished from *matrimonium.*" But even if *maritagium* would bear the meaning given to it by Lord Coke and the author, the context seems to make it obvious that such cannot be the right interpretation in this place. It is clear that the object of this part of Magna Carta is to provide for the widow's maintenance and enjoyment of her rights *as such* immediately after the death of her husband; and with minute care it specifies the three classes of property to which she might be entitled: these were, 1st, her lands in frank marriage, *maritagium;* 2d, lands of her own inheritance, *hæreditas sua;* 3d, her dower, *dos.* After the general directions as to all three, which I have cited, it goes on more particularly to provide for the due assignment of her dower within forty days, for her residence in the capital mansion during those forty days, and for the quantity of land to which as dowager she is entitled. It is obvious that these provisions were necessary as to dower, but not as to the two former kinds of estate.

Having thus provided for her maintenance as widow, the same clause in the end, goes on to protect her against being compelled to a second marriage: *Nulla vidua distringatur ad se maritandum dum vivere voluerit sine marito, ita tamen quod securitatem faciet, quod se non maritabit sine assensu nostro si de nobis tenuerit, vel sine assensu domini sui si de alio tenuerit.* It is remarkable therefore, that Lord Coke should say that they were to marry where they would without any license or assent of their lords. He indeed admits, in his comment on this clause, that the widow of a chivalry

shall be distrained to marry afresh, if she chooses to live without a husband; but shall not however marry against the consent of the lord; and farther, that nothing shall be taken for assignment of the widow's dower, but that she shall remain in her husband's capital mansion-house for forty days after his death, during which time her dower shall be assigned. These forty days are called the widow's *quarentine*, a term made use of in law to signify the number of forty days, whether applied to this occasion, or any other[a]. The particular lands, to be held in dower, must be assigned[b] by the heir of the husband, or his guardian; not only for the sake of notoriety, but also to entitle the lord of the fee to demand his services of the heir, in respect of the lands so holden. For the heir by this entry becomes tenant thereof to the lord, and [136] the widow is immediate tenant to the heir, by a kind of sub-infeudation, or under-tenancy completed by this investiture or assignment; which tenure may still be created, notwithstanding the statute of *quia emptores*, because the heir parts not with the fee-simple, but only with an estate for life. If the heir or his guardian do not assign her dower within the term of quarantine, or do assign it unfairly, she has her remedy at law, and the sheriff is appointed to assign it[c]. Or if the heir (being under age) or his guardian assign more than she ought to have, it may be afterwards remedied by writ of *admeasurement* of dower[d]. If the thing of which she is endowed be divisible, her dower must be set out by metes and bounds; but if it be indivisible, she must be endowed specially; as of the third presentation to a church, the third toll-dish of a

[a] It signifies, in particular, the forty days, which persons coming from infected countries are obliged to wait, before they are permitted to land in England.

[b] Co. Litt. 34, 35.

[c] Co. Litt. 34, 35.

[d] F. N. B. 148. Finch L. 314. Stat. Westm. 2. 13 Edw. I. c. 7.

---

tenant in chief, paid a year's value of her dower if she married without the king's license; but says, that in other cases the statute was to be understood to apply only where a license was due by custom, prescription, or special tenure. For this, however, he only refers to Litt. s. 174. and his commentary on it, neither of which is to the purpose.

Upon the whole it seems clear that Magna Carta does not provide that widows were not to pay for leave to contract a second marriage: but on the contrary, by making the lord's assent necessary, in effect put it in his power to exact a payment.

mill, the third part of the profits of an office, the third sheaf of tithe, and the like [c].

Upon preconcerted marriages, and in estates of considerable consequence, tenancy in dower happens very seldom: for the claim of the wife to her dower at the common law diffusing itself so extensively, it became a great clog to alienations, and was otherwise inconvenient to families. Wherefore, since the alteration of the antient law respecting dower *ad ostium ecclesiae*, which hath occasioned the entire disuse of that species of dower, jointures have been introduced in their stead, as a bar to the claim at common law. Which leads me to inquire, lastly,

4. How dower may be *barred* or prevented. A widow may be barred of her dower not only by elopement, divorce, being an alien, the treason of her husband, and other disabilities before-mentioned; but also by detaining the title deeds or evidences of the estate from the heir, until she restores them [f]: and, by the statute of Gloucester [g], if a dowager alienes the land assigned her for dower, she forfeits it *ipso facto*, and
[137] the heir may recover it by action. (16) A woman also may be barred of her dower, by levying a fine, or suffering a recovery of the lands, during her coverture [h]. But the most

[c] Co. Litt. 32.
[f] *Ibid.* 39.
[g] 6 Edw. I. c. 7.
[h] Pig. of recov. 66.

(16) The alienation of the estate by the tenant, in dower, in fee, or for the life of a stranger, was in itself, at common law, a forfeiture of the estate, and the heir might *immediately* enter; as in the case of such alienation by any other tenant for life. See post, p. 274. The statute of Gloucester, c. 7. was made to remedy a different evil: if the alienee died seised, the heir could not enter on his heir, and was driven to his writ of entry. But the writ of entry *ad communem legem* did not lie for him so long as the dowager lived; and if he waited till her death, then if he was her heir also, which in most cases he was, he might be barred for ever as such by the warranty which she had made on her alienation. This writ, therefore, called the writ *in casu proviso*, was given by the statute, and might be sued out immediately, and during the life of the dowager, when of course she had no heir, and was herself only answerable on her own warranty. The statute says the heir *eit* maintenant *son recoverie*, which Lord Coke explains in the life-time of the tenant in dower. See post, Vol. III. p. 183. n. [2]. F. N. B. 205. 207. 2 Inst. 309.

usual method of barring dowers is by jointures, as regulated by the statute 27 Hen. VIII. c. 10.

A JOINTURE, which, strictly speaking, signifies a joint estate, limited to both husband and wife, but in common acceptation extends also to a sole estate, limited to the wife only, is thus defined by sir Edward Coke[1]; "a competent livelihood "of freehold for the wife, of lands and tenements; to take "effect, in profit or possession, presently after the death of "the husband, for the life of the wife at least." This description is framed from the purview of the statute 27 Henry VIII. c. 10. before mentioned; commonly called the statute of *uses*, of which we shall speak fully hereafter. At present I have only to observe, that before the making of that statute, the greatest part of the land of England was conveyed to uses; the property or possession of the soil being vested in one man, and the use or profits thereof in another; whose directions, with regard to the disposition thereof, the former was in conscience obliged to follow, and might be compelled by a court of equity to observe. Now, though a husband had the *use* of lands in absolute fee-simple, yet the wife was not entitled to any dower therein; he not being *seised* thereof: wherefore it became usual, on marriage, to settle by express deed some special estate to the use of the husband and his wife, for their lives, in joint-tenancy, or jointure; which settlement would be a provision for the wife in case she survived her husband. At length the statute of uses ordained, that such as had the *use* of lands should, to all intents and purposes, be reputed and taken to be absolutely *seised* and possessed of the soil itself. In consequence of which legal seisin, all wives would have become dowable of such lands as were held to the use of their husbands, and also entitled at the same time to any special lands that might be settled in jointure: had not the same statute provided, that upon making such an estate in jointure to the wife before marriage, she shall be for ever precluded [138] from her dower[k]. (17) But then these four requisites must

[1] 1 Inst 36. [k] 4 Rep. 1, 2.

(17) There were more reasons than one for this according to the circumstances of the settlement being made before or after marriage, or before or after the husband's death. They were all sufficiently strict and technical; but

be punctually observed: 1. The jointure must [be limited to] take effect immediately on the death of the husband. 2. It must be for her own life at least, and not *pur auter vie*, or for any term of years, or other smaller estate. 3. It must be made to herself, and no other in trust for her. 4. It must be made, and so in the deed particularly expressed to be, in satisfaction of her whole dower, and not of any particular part of it. If the jointure be made to her *after* marriage, she has her election after her husband's death, as in dower *ad ostium ecclesiae*, and may either accept it, or refuse it and betake herself to her dower at common law; for she was not capable of consenting to it during coverture. And if, by any fraud or accident, a jointure made before marriage proves to be on a bad title, and the jointress is evicted, or turned out of possession, she shall then (by the provisions of the same statute) have her dower *pro tanto* at the common law[1]. (18)

[1] These settlements, previous to marriage, seem to have been in use among the antient Germans, and their kindred nation the Gauls. Of the former Tacitus gives us this account. "*Dotem non uxor marito, sed uxori maritus offert; intersunt parentes et propinqui, et munera probant.*" (*de mor. Germ. c.* 18.) And Cæsar (*de bello Gallico, l.*6. *c.*18.) has given us the terms of a marriage settlement among the Gauls, as nicely calculated as any modern jointure. "*Viri, quantas pecunias ab uxoribus dotis nomine acceperunt, tantas ex suis bonis, aestimatione facta, cum dotibus communicant. Hujus omnis pecuniae conjunctim ratio habetur, fructusque servantur. Uter eorum vita superavit, ad eum pars utriusque cum fructibus superiorum temporum pervenit.*" The dauphin's commentator on Cæsar supposes that this Gaulish custom was the ground of the new regulations made by Justinian (*Nov.* 97.) with regard to the provision for widows among the Romans; but surely there is as much reason to suppose, that it gave the hint for our statutable jointures.

---

but one general reason applied to all the cases, which it will be enough to state; it was this, that "a right or title which any one has to any lands or tenements, of any estate of inheritance, or freehold, cannot be barred by acceptance of any manner of collateral satisfaction or recompence." This was a strict rule, and the example which Lord Coke puts, shows that it was not confined to dower. "As if," says he, "A disseises B tenant for life or in fee of the manor of Dale, and afterwards gives the manor of Sale to B and his heirs in full satisfaction of all his rights and actions which he has in or for the manor of Dale, *which B accepts*, yet B may enter into the manor of Dale, or recover it in any *real* action. See Vernon's case, 4 Rep. 1. &c.

(18) As to the 1st requisite, I have ventured to insert two or three words in the text, because Lord Coke, from whom the passage is taken, (Co. Litt. 36.) is express that it is not enough, that in fact and by accident the jointure takes effect immediately on the death of the husband, as if an interposed

THERE are some advantages attending tenants in dower that do not extend to jointresses; and so *vice versa*, jointresses are in some respects more privileged than tenants in dower. Tenant in dower by the old common law is subject to no tolls or taxes; and hers is almost the only estate on which, when derived from the king's debtor, the king cannot distrein for his debt; if contracted during the coverture [m]. But, on the other hand, a widow may enter at once, without any formal process, on her jointure land; as she also might have done on dower *ad ostium ecclesiae*, which jointure in many points resembles; and the resemblance was still greater, while that species of dower continued in its primitive state: whereas no small trouble, and a very tedious method of proceeding, is necessary to compel a legal assignment of dower [n], And, what is more, though dower be forfeited by the treason of the husband, yet lands settled in jointure remain unimpeached to the widow [o]. Wherefore sir Edward Coke very justly gives it the preference, as being more sure and safe to the widow, than even dower *ad ostium ecclesiae*, the most eligible species of any.

[m] Co. Litt. 31. a. F. N. B. 150. [o] *Ibid.* 37.
[n] Co. Litt. 36.

---

interposed remainder-man for life should die before the husband; but that the limitation of the deed must be to the wife immediately after the husband's death, where the estate is not joint. As to the 3d, though the position is true at law, yet it is now settled that a trust estate being equally certain and beneficial as a legal estate, is a good equitable jointure to bar dower. (Hargrave's Note, 226. Co. Litt. 36.) As to the 4th, Lord Coke says it must either be expressed, or *averred* to be so; and in 4 Rep. 3. it is laid down, that it need not be expressed, but may be averred to be, &c.; that is, the deed being pleaded, and being silent as to its object, or stating one not inconsistent with this, this may be stated and averred supplementally to have been the object, or part of the object.

CHAPTER THE NINTH.

OF ESTATES LESS THAN FREEHOLD.

OF estates that are less than freehold, there are three sorts: 1. Estates for years: 2. Estates at will: 3. Estates by sufferance.

I. An estate for *years* is a contract for the possession of lands or tenements, for some determinate period; and it takes place where a man letteth them to another for the term of a certain number of years, agreed upon between the lessor and the lessee[a], and the lessee enters thereon[b]. If the lease be but for half a year or a quarter, or any less time, this lessee is respected as a tenant for years, and is styled so in some legal proceedings; a year being the shortest term which the law in this case takes notice of[c]. And this may, not improperly, lead us into a short digression, concerning the division and calculation of time by the English law.

The space of a year is a determinate and well-known period, consisting commonly of 365 days; for, though in bissextile or leap-years it consists properly of 366, yet by the statute
[141] 21 Hen. III. the increasing day in the leap-year, together with the preceding day, shall be accounted for one day only.

[a] We may here remark, once for all, that the termination of "—or" and "—ee" obtain, in law, the one an active, the other a passive signification; the former usually denoting the doer of any act, the latter him to whom it is done. The feoffor is he that maketh a feoffment; the feoffee is he to whom it is made: the donor is one that giveth lands in tail; the donee is he who receiveth it; he that granteth a lease is denominated the lessor; and he to whom it is granted the lessee. (Litt. § 57.)

[b] *Ibid.* 58.

[c] *Ibid.* 67.

That of a month is more ambiguous: there being, in common use, two ways of calculating months; either as lunar, consisting of twenty-eight days, the supposed revolution of the moon, thirteen of which make a year: or, as calendar months of unequal lengths, according to the Julian division in our common almanacks, commencing at the calends of each month, whereof in a year there are only twelve. A month in law is a lunar month, or twenty-eight days, unless otherwise expressed; not only because it is always one uniform period, but because it falls naturally into a quarterly division by weeks. Therefore a lease for "twelve months" is only for forty-eight weeks; but if it be for "*a* twelvemonth" in the singular number, it is good for the whole year [d]. For herein the law recedes from its usual calculation, because the ambiguity between the two methods of computation ceases; it being generally understood that by the space of time called thus, in the singular number, a twelvemonth, is meant the whole year, consisting of one solar revolution. (1) In the space of a day all the twenty-four hours are usually reckoned, the law generally rejecting all fractions of a day, in order to avoid disputes [e]. Therefore, if I am bound to pay money on any certain day, I discharge the obligation if I pay it before twelve o'clock at night; after which the following day commences. But to return to estates for years.

THESE estates were originally granted to mere farmers or husbandmen, who every year rendered some equivalent in money, provisions, or other rent, to the lessors or landlords: but, in order to encourage them to manure and cultivate the ground, they had a permanent interest granted them, not determinable at the will of the lord. And yet their possession

[d] 6 Rep. 61. Co. Litt. 135.

(1) If it should appear clearly in a statute that calendar months were intended, the word "month" would be so understood. *Lacon* v. *Hooper*, 2 T. R. 224. On this principle partly, and partly because in a matter relating to the church the canonical computation ought to be adopted, the six months, which make a presentation lapse, are held to be calendar months. (See post, 276, & 6 Rep. 61.) The adoption of the law merchant makes another exception in the case of bills of exchange and promissory notes.

was esteemed of so little consequence, that they were rather considered as the bailiffs or servants of the lord, who were to
[142] receive and account for the profits at a settled price, than as having any property of their own. And therefore they were not allowed to have a freehold estate: but their interest (such as it was) vested after their deaths in their executors, who were to make up the accounts of their testator with the lord, and his other creditors, and were entitled to the stock upon the farm. The lessee's estate might also, by the antient law, be at any time defeated by a common recovery suffered by the tenant of the freehold [f]; which annihilated all leases for years then subsisting, unless afterwards renewed by the recoveror, whose title was supposed superior to his by whom those leases were granted.

While estates for years were thus precarious, it is no wonder that they were usually very short, like our modern leases upon rack rent; and indeed we are told [g] that by the antient law no leases for more than forty years were allowable, because any longer possession (especially when given without any livery declaring the nature and duration of the estate) might tend to defeat the inheritance. Yet this law, if ever it existed, was soon antiquated; for we may observe in Madox's collection of antient instruments, some leases for years of a pretty early date, which considerably exceed that period [h]: and long terms, for three hundred years or a thousand, were certainly in use in the time of Edward III.[i], and probably of Edward I.[k] But certainly, when by the statute 21 Hen. VIII. c. 15. the termor (that is, he who is entitled to the term of years) was protected against these fictitious recoveries, and his interest rendered secure and permanent, long terms began to be more frequent than before; and were afterwards extensively introduced, being found extremely convenient for family settlements and mortgages: continuing subject, however, to the same rules of succession, and with the same inferiority to

[f] Co. Litt. 46.

[g] Mirror, c. 2. § 27. Co. Litt. 45, 46.

[h] Madox *Formulare Anglican.* n°. 239. *fol.* 140. Demise for eighty years, 21 Ric. II. . . . . *Ibid.* n°. 245. *fol.* 146. for the like term, *A. D.* 1429. . . . . *Ibid.* n°. 248. *fol.* 148. for fifty years, 7 Edw. IV.

[i] 32 Ass. pl. 6. Bro. Abr. t. *mordauncestor*, 42. *spoliation*, 6.

[k] Stat of mortmain, 7 Edw. I.

freeholds, as when they were little better than tenancies at the will of the landlord.

EVERY estate which must expire at a period certain and prefixed, by whatever words created, is an estate for years. And therefore this estate is frequently called a term, *terminus*, because its duration or continuance is bounded, limited, and determined: for every such estate must have a certain beginning, and certain end[l]. But *id certum est, quod certum reddi potest*: therefore if a man make a lease to another, for so many years as J. S. shall name, it is a good lease for years[m]; for though it is at present uncertain, yet when J. S. hath named the years, it is then reduced to a certainty. If no day of commencement is named in the creation of this estate, it begins from the making, or delivery, of the lease[n]. A lease for so many years as J. S. shall live, is void from the beginning[o]; for it is neither certain, nor can ever be reduced to a certainty, during the continuance of the lease. And the same doctrine holds, if a parson make a lease of his glebe for so many years as he shall continue parson of Dale; for this is still more uncertain. But a lease for twenty or more years, if J. S. shall so long live, or if he should so long continue parson, is good[p]: for there is a certain period fixed, beyond which it cannot last; though it may determine sooner, on the death of J. S. or his ceasing to be parson there.

WE have before remarked, and endeavoured to assign the reason of, the inferiority in which the law places an estate for years, when compared with an estate for life, or an inheritance: observing that an estate for life, even if it be *pur auter vie*, is a freehold; but that an estate for a thousand years is only a chattel, and reckoned part of the personal estate[q]. Hence it follows, that a lease for years may be made to commence *in futuro*, though a lease for life cannot. As, if I grant lands to Titius to hold from Michaelmas next for twenty years, this is good; but to hold from Michaelmas next for the [144] term of his natural life, is void. For no estate of freehold

[l] Co. Litt. 45.
[m] 6 Rep. 35.
[n] Co. Litt. 46.
[o] Co. Litt. 45.
[p] *Ibid.*
[q] *Ibid.* 46.

can commence *in futuro*; because it cannot be created at common law without livery of seisin, or corporal possession of the land; and corporal possession cannot be given of an estate now, which is not to commence now, but hereafter[r]. And, because no livery of seisin is necessary to a lease for years, such lessee is not said to be *seised*, or to have true legal seisin of the lands. Nor indeed does the bare lease vest any estate in the lessee; but only gives him a right of entry on the tenement, which right is called his *interest in the term*, or *interesse termini*: but when he has actually so entered, and thereby accepted the grant, the estate is then, and not before, vested in him, and he is *possessed*, not properly of the land, but of the term of years[s]; the possession or seisin of the *land* remaining still in him who hath the freehold. (2) Thus the word, *term*, does not merely signify the time specified in the lease, but the estate also and interest that passes by that lease; and therefore the *term* may expire, during the continuance of the *time*; as by surrender, forfeiture, and the like. For which reason, if I grant a lease to A for the term of three years, and after the expiration of the said *term*, to B for six years, and A surrenders or forfeits his lease at the end of *one* year, B's interest shall immediately take effect: but if the remainder be to B from and after the expiration of the said *three years*, or from and after the expiration of the said *time*, in this case B's interest will not commence till the time is fully elapsed, whatever may become of A's term[t].

TENANT for term of years hath incident to and inseparable from his estate, unless by special agreement, the same estovers,

[r] 5 Rep. 94. [s] Co. Litt. 46. [t] *Ibid.* 45.

(2) "But yet the lessor having done all that was requisite on his part to divest himself of the possession, and pass it over to the lessee, had thereby transferred such an interest to the lessee, as he might at any time reduce into possession by an actual entry, as well after the death of the lessor as before, and such an interest as he might before entry grant over to another, or if he died before entry, it would go to his executors, or to the survivor and *his* executors, if the grant were made to two jointly, any of which might enter at their pleasure, and so reduce the contract into actual execution. For it was perfect and complete on the lessor's part, and the perfecting of it on the lessee's part, was entirely in his own power. Bac. Abr. tit. Leases, M.

which we formerly observed[u] that tenant for life was entitled to; that is to say, house-bote, fire-bote, plough-bote, and hay-bote[w]; terms which have been already explained[x].

[145] With regard to emblements, or the profits of lands sowed by tenant for years, there is this difference between him, and tenant for life: that where the term of tenant for years depends upon a certainty, as if he holds from midsummer for ten years, and in the last year he sows a crop of corn, and it is not ripe and cut before midsummer, the end of his term, the landlord shall have it; for the tenant knew the expiration of his term, and therefore it was his own folly to sow what he never could reap the profits of[y]. But where the lease for years depends upon an uncertainty: as, upon the death of a lessor, being himself only tenant for life, or being a husband seised in right of his wife; or if the term of years be determinable upon a life or lives; in all these cases the estate for years not being certainly to expire at a time fore-known, but merely by the act of God, the tenant, or his executors, shall have the emblements in the same manner that a tenant for life or his executors shall be entitled thereto[z]. Not so, if it determine by the act of the party himself: as if tenant for years does any thing that amounts to a forfeiture: in which case the emblements shall go to the lessor and not to the lessee, who hath determined his estate by his own default[a].

II. The second species of estates not freehold, are estates at *will*. An estate at will is where lands and tenements are let by one man to another, to have and to hold at the will of the lessor; and the tenant by force of this lease obtains possession[b]. Such tenant hath no certain indefeasible estate, nothing that can be assigned by him to any other; because the lessor may determine his will, and put him out whenever he pleases. But every estate at will is at the will of both parties, landlord and tenant; so that either of them may determine his will, and quit his connexions with the other at his own pleasure[c]. Yet this must be understood with some

[u] pag. 122.
[w] Co. Litt. 53.
[x] pag. 35.
[y] Litt. § 68.
[z] Co. Litt. 56.
[a] *Ibid.* 55.
[b] Litt. § 68.
[c] Co. Litt. 55.

restriction. For if the tenant at will sows his land, and the landlord, before the corn is ripe, or before it is reaped, puts him out, yet the tenant shall have the emblements, and free ingress, egress, and regress, to cut and carry away the profits [d]. And this for the same reason, upon which all the cases of emblements turn; *viz.* the point of uncertainty: since the tenant could not possibly know when his landlord would determine his will, and therefore could make no provision against it; and having sown the land, which is for the good of the public, upon a reasonable presumption, the law will not suffer him to be a loser by it. But it is otherwise, and upon reason equally good, where the tenant himself determines the will; for in this case the landlord shall have the profits of the land [e].

WHAT act does, or does not, amount to a determination of the will on either side, has formerly been matter of great debate in our courts. But it is now, I think, settled, that (besides the express determination of the lessor's will, by declaring that the lessee shall hold no longer: which must either be made upon the land [f], or notice must be given to the lessee [g]) the exertion of any act of ownership by the lessor, as entering upon the premises and cutting timber [h], taking a distress for rent and impounding it thereon [i], or making a feoffment, or lease for years of the land to commence immediately [k]; any act of desertion by the lessee, as assigning his estate to another, or committing waste, which is an act inconsistent with such a tenure [l]; or, which is *instar omnium*, the death or outlawry of either lessor or lessee [m]; puts an end to or determines the estate at will.

THE law is however careful, that no sudden determination of the will by one party shall tend to the manifest and unforeseen prejudice of the other. This appears in the case of
[147] emblements before mentioned; and, by a parity of reason, the lessee, after the determination of the lessor's will, shall

[d] Co. Litt. 56.
[e] *Ibid.* 55.
[f] *Ibid.*
[g] 1 Ventr. 248.
[h] Co. Litt. 55.
[i] Co. Litt. 57.
[k] 1 Rol. Abr. 860. 2 Lev. 38.
[l] Co. Litt. 57.
[m] 5 Rep. 116. Co. Litt. 57. 62.

have reasonable ingress and egress to fetch away his goods and utensils[n]. And if rent be payable quarterly, or half-yearly, and the lessee determines the will, the rent shall be paid to the end of the current quarter or half year[o]. And, upon the same principle, courts of law have of late years leaned as much as possible against construing demises, where no certain term is mentioned, to be tenancies at will; but have rather held them to be tenancies from year to year so long as both parties please, especially where an annual rent is reserved: in which case they will not suffer either party to determine the tenancy even at the end of the year, without reasonable notice to the other, which is generally understood to be six months[p]. (3)

THERE is one species of estates at will that deserves a more particular regard than any other; and that is, an estate held by copy of court roll: or, as we usually call it, a *copyhold* estate. This, as was before observed[q], was in it's original and foundation nothing better than a mere estate at will. But, the kindness and indulgence of successive lords of manors having permitted these estates to be enjoyed by the

[n] Litt. § 69.

[o] Salk. 414. 1 Sid. 339.

[p] This kind of lease was in use as long ago as the reign of Henry VIII. when half a year's notice seems to have been required to determine it. (*T.* 18 *Hen. VIII.* 15, 16.)

[q] pag. 95.

(3) This head of law is now of the less importance, because in pursuance of that leaning, which the text mentions, it seems settled that what was formerly a tenancy at will by implication, shall now be considered a tenancy from year to year, determinable by half a year's notice expiring at the end of a current year. And it has been held even in construing the statute of frauds, where the words are that any lease, &c. for more than three years not in writing, shall operate only as a tenancy at will, that such a lease makes a tenancy from year to year. *Clayton* v. *Blackey*, 8 T.R. 3. I use the term tenancy at will *by implication*, because the general expressions that tenancies at will exist only notionally, and are, in fact, become tenancies from year to year, must be confined to those cases in which no determinate term being expressed, the law formerly implied a holding at will, and in which it would now, from an annual reservation of rent, or any other circumstance shewing that the parties contemplated a holding for a year at least, imply a tenancy from year to year. A strict tenancy at will may be still created, though it seldom is so, by express agreement. See Hargr. and Butler's Co. Litt. 55 a. n. 361. and the case of *Richardson* v. *Langridge*, 4 Taunt. 128.

tenants and their heirs, according to particular customs established in their respective districts; therefore, though they still are held at the will of the lord, and so are in general expressed in the court rolls to be, yet that will is qualified, restrained, and limited, to be exerted according to the custom of the manor. This custom being suffered to grow up by the lord, is looked upon as the evidence and interpreter of his will: his will is no longer arbitrary and precarious; but fixed and ascertained by the custom to be the same, and no other, that has time out of mind been exercised and declared by his ancestors. A copyhold tenant is therefore now full as properly a tenant by the custom as a tenant at will; the custom
[148] having arisen from a series of uniform wills. And therefore it is rightly observed by Calthorpe[t], "that copyholders and "customary tenants differ not so much in nature as in "name; for although some be called copyholders, some cus-"tomary, some tenants by the virge, some base tenants, some "bond tenants, and some by one name and some by another, "yet do they all agree in substance and kind of tenure; all "the said lands are holden in one general kind, that is, by "custom and continuance of time; and the diversity of their "names doth not alter the nature of their tenure."

Almost every copyhold tenant being therefore thus tenant at the will of the lord according to the custom of the manor; which customs differ as much as the humour and temper of the respective antient lords, (from whence we may account for their great variety,) such tenant, I say, may have, so far as the custom warrants, any other of the estates or quantities of interest, which we have hitherto considered, or may hereafter consider, and hold them united with this customary estate at will. A copyholder may, in many manors, be tenant in fee-simple, in fee-tail, for life, by the curtesy, in dower, for years, at sufferance, or on condition: subject however to be deprived of these estates upon the concurrence of those circumstances which the will of the lord, promulgated by immemorial custom, has declared to be a forfeiture or absolute determination of those interests; as in some manors the want of issue male, in others the cutting down timber, the non-

[t] On copyholds, 51. 54.

payment of a fine, and the like. Yet none of these interests amount to freehold; for the freehold of the whole manor abides always in the lord only[s], who hath granted out the use and occupation, but not the corporal seisin or true legal possession, of certain parcels thereof, to these his customary tenants at will.

THE reason of originally granting out this complicated kind of interest, so that the same man shall, with regard to the same land, be at one and the same time tenant in fee-simple and also tenant at the lord's will, seems to have arisen from the nature of villenage tenure; in which a grant of any [149] estate of freehold, or even for years absolutely, was an immediate enfranchisement of the villein[t]. The lords, therefore, though they were willing to enlarge the interest of their villeins, by granting them estates which might endure for their lives, or sometimes be descendible to their issue, yet not caring to manumit them entirely, might probably scruple to grant them any absolute freehold; and for that reason it seems to have been contrived, that a power of resumption at the will of the lord should be annexed to these grants, whereby the tenants were still kept in a state of villenage, and no freehold at all was conveyed to them in their respective lands: and of course, as the freehold of all lands must necessarily rest and abide somewhere, the law supposed it still to continue and remain in the lord. Afterwards, when these villeins became modern copyholders, and had acquired by custom a sure and indefeasible estate in their lands, on performing their usual services, but yet continued to be styled in their admissions tenants at the will of the lord, — the law still supposed it an absurdity to allow, that such as were thus nominally tenants at will could have any freehold interest; and therefore continued and now continues to determine, that the freehold of lands so holden abides in the lord of the manor, and not in the tenant; for though he *really* holds to him and his heirs for ever, yet he is also *said* to hold at another's will. But with regard to certain other copyholders of free or privileged tenure, which are derived from the antient tenants in villein-socage[u], and are not said to hold *at the will of the*

[s] Litt. § 81. 2 Inst. 325.

[t] Mirr. c. 2. § 28. Litt. § 204, 5, 6.

[u] See page 98, &c.

lord, but only *according to the custom of the manor*, there is no such absurdity in allowing them to be capable of enjoying a freehold interest: and therefore the law doth not suppose the freehold of such lands to rest in the lord of whom they are holden, but in the tenants themselves[v]; who are sometimes
[150] called *customary freeholders*, being allowed to have a freehold *interest*, though not a freehold *tenure*. (4)

However, in common cases, copyhold estates are still ranked (for the reasons above mentioned) among tenancies at will; though custom, which is the life of the common law, has established a permanent property in the copyholders, who were formerly nothing better than bondmen, equal to that of the lord himself, in the tenements holden of the manor; nay sometimes even superior; for we may now look upon a copyholder of inheritance, with a fine certain, to be little inferior to an absolute freeholder in point of interest, and in other respects, particularly in the clearness and security of his title, to be frequently in a better situation.

III. An estate at *sufferance*, is where one comes into possession of land by lawful title, but keeps it afterwards without any title at all. As, if a man takes a lease for a year, and after a year is expired continues to hold the premises without any fresh leave from the owner of the estate. Or, if a man maketh a lease at will and dies, the estate at will is thereby determined: but if the tenant continueth possession he is tenant at sufferance[w]. But, no man can be tenant at sufferance against the king, to whom no *laches*, or neglect in not entering and ousting the tenant, is ever imputed by law; but his tenant so holding over, is considered as an absolute intruder[x]. But, in the case of a subject, this estate may be destroyed whenever the true owner shall make an actual

[v] Fitz. *Abr. tit. corone.* 310. *custom.* 12. *Bro. Abr. tit. custom.* 2. 17. *tenant per copie.* 22. 9 Rep. 76. Co. Litt. 59. Co. Copyh. § 32. Cro. Car. 229. 1 Roll. Abr. 562. 2 Ventr. 143. Carth. 432. Lord Raym. 1225.

[w] Co. Litt. 57.

[x] *Ibid.* 57.

(4) See the Considerations on Copyholders, by the Author. Law Tracts, 5th edit. v. i.

entry on the lands and oust the tenant: for, before entry, he cannot maintain an action of trespass against the tenant by sufferance, as he might against a stranger[y]: and the reason is, because the tenant being once in by a lawful title, the law (which presumes no wrong in any man) will suppose him to continue upon a title equally lawful; unless the owner of the land by some public and avowed act, such as entry is, will declare his continuance to be tortious, or, in common language, wrongful.

THUS stands the law, with regard to tenants by sufferance, [151] and landlords are obliged in these cases to make formal entries upon their lands[z], and recover possession by the legal process of ejectment; and at the utmost, by the common law, the tenant was bound to account for the profits of the land so by him detained. (5) But now, by statute 4 Geo. II. c. 28. in case any tenant for life or years, or other person claiming under or by collusion with such tenant, shall wilfully hold over after the determination of the term, and demand made and notice in writing given, by him to whom the remainder or reversion of the premises shall belong, for delivering the possession thereof; such person, so holding over or keeping the other out of possession, shall pay for the time he detains the lands, at the rate of double their yearly *value*. And, by statute 11 Geo. II. c. 19. in case any tenant, having power to determine his lease, shall give notice of his intention to quit the premises, and shall not deliver up the possession at the time contained in such notice, he shall thenceforth pay

[y] *Ibid.* [z] 5 Mod. 384.

(5) The author must not be understood to mean, I conceive, that actual entry and legal process of ejectment are both necessary to reinstate the landlord in his legal possession. He may enter and take possession peaceably, and the tenant will be liable to an action for any disturbance of that possession; even if he enter forcibly, the tenant cannot complain *civilly*, though the landlord may be liable to a criminal proceeding for the breach of the peace. *Taunton* v. *Costar*, 7 T. R. 431. *Turner* v. *Meymott*, 1 Bingh. 158. If the landlord proceeds by ejectment, a notice to quit may, in certain cases, be necessary to determine the tenant's interest, but supposing him to be barely holding over, and to have acquired no interest by the recognition of the landlord, even that will not be necessary; and in neither case will an actual entry be necessary.

double the former *rent*, for such time as he continues in possession. These statutes have almost put an end to the practice of tenancy by sufferance, unless with the tacit consent of the owner of the tenement. (6)

---

(6) The student will not fail to perceive the distinction between the two statutes; in the first the landlord has determined the tenancy, and therefore recovers double *value;* in the latter the tenancy being only determinable, and the tenant having waived *his* determination of it, while the landlord has done nothing on his part to put an end to it, the penalty is the payment of double *rent.* The statute enables him to distrain, or to bring his action for the double rent; whichever of these two remedies he pursues, he treats the defendant as still his tenant, and therefore cannot concurrently bring an action of ejectment, in which he is to treat him as a trespasser for the same period of time.

CHAPTER THE TENTH.

OF ESTATES UPON CONDITION.

BESIDES the several divisions of estates in point of interest, which we have considered in the three preceding chapters, there is also another species still remaining, which is called an estate *upon condition*; being such whose existence depends upon the happening or not happening of some uncertain event, whereby the estate may be either originally created, or enlarged, or finally defeated[a]. And these conditional estates I have chosen to reserve till last, because they are, indeed, more properly qualifications of other estates, than a distinct species of themselves; seeing that any quantity of interest, a fee, a freehold, or a term of years, may depend upon these provisional restrictions. Estates, then, upon condition, thus understood, are of two sorts: 1. Estates upon condition *implied*: 2. Estates upon condition *expressed*: under which last may be included, 3. Estates held *in vadio*, *gage*, or *pledge*: 4. Estates by *statute merchant*, or *statute staple*: 5. Estates held by *elegit*.

I. ESTATES upon condition implied in law, are where a grant of an estate has a condition annexed to it inseparably, from its essence and constitution, although no condition be expressed in words. As if a grant be made to a man of an office, generally, without adding other words; the law tacitly annexes hereto a secret condition, that the grantee shall duly execute his office[b], on breach of which condition it is lawful [153] for the grantor, or his heirs, to oust him, and grant it to another person[c]. For an office, either public or private, may

[a] Co. Litt. 201. [b] Litt. § 378. [c] *Ibid.*

be forfeited by *mis-user* or *non-user*, both of which are breaches of this implied condition. 1. By *mis-user*, or abuse; as if a judge takes a bribe, or a park-keeper kills deer without authority. 2. By *non-user*, or neglect; which in public offices, that concern the administration of justice, or the commonwealth, is of itself a direct and immediate cause of forfeiture; but non-user of a private office is no cause of forfeiture, unless some special damage is proved to be occasioned thereby[d]. For in the one case delay must necessarily be occasioned in the affairs of the public, which require a constant attention: but, private offices not requiring so regular and unremitted a service, the temporary neglect of them is not necessarily productive of mischief: upon which account some special loss must be proved, in order to vacate these. Franchises also, being regal privileges in the hands of a subject, are held to be granted on the same condition of making a proper use of them; and therefore they may be lost and forfeited, like offices, either by abuse or by neglect[e].

Upon the same principle proceed all the forfeitures which are given by law of life estates and others; for any acts done by the tenant himself, that are incompatible with the estate which he holds. As if tenants for life or years enfeoff a stranger in fee-simple: this is, by the common law, a forfeiture of their several estates; being a breach of the condition which the law annexes thereto, *viz.* that they shall not attempt to create a greater estate than they themselves are entitled to[f]. So if any tenants for years, for life, or in fee, commit a felony; the king or other lord of the fee is entitled to have their tenements, because their estate is determined by the breach of the condition, "that they shall not commit "felony," which the law tacitly annexes to every feodal donation. (1)

[154] II. An estate on condition expressed in the grant itself is where an estate is granted, either in fee-simple or otherwise,

[d] Co. Litt. 233. [e] 9 Rep. 50. [f] Co. Litt. 215.

(1) As to tenant for years, if he be convicted of felony, his term being a chattel interest, will be forfeited to the *crown*, not in any feudal right, or as for a breach of any condition implied in the creation of his estate.

with an express qualification annexed, whereby the estate granted shall either commence, be enlarged, or be defeated, upon performance or breach of such qualification or condition [g]. These conditions, are, therefore either *precedent* or *subsequent*. Precedent are such as must happen or be performed before the estate can vest or be enlarged: subsequent are such, by the failure or non-performance of which an estate already vested may be defeated. Thus, if an estate for life be limited to A upon his marriage with B, the marriage is a precedent condition, and till that happens no estate [h] is vested in A. Or, if a man grant to his lessee for years, that upon payment of a hundred marks within the term he shall have the fee, this also is a condition precedent, and the fee-simple passeth not till the hundred marks be paid.[i]. But if a man grant an estate in fee-simple, reserving to himself and his heirs a certain rent; and that if such rent be not paid at the time limited, it shall be lawful for him and his heirs to re-enter, and avoid the estate: in this case the grantee and his heirs have an estate upon condition subsequent, which is defeasible if the condition be not strictly performed [k]. To this class may also be referred all base fees, and fee-simples conditional at the common-law [l]. Thus an estate to a man and his heirs *tenants of the manor of Dale*, is an estate on condition that he and his heirs continue tenants of that manor. And so, if a personal annuity be granted at this day to a man and the heirs of his body, as this is no tenement within the statute of Westminster the second, it remains, as at common law, a fee-simple on condition that the grantee has heirs of his body. Upon the same principle depend all the determinable estates of freehold, which we mentioned in the eighth chapter: as *durante viduitate, &c*: these are estates upon condition that the grantees do not marry, and the like. And, on the breach of any of these subsequent conditions, by the failure of these contingencies: [155] by the grantee's not continuing tenant of the manor of Dale, by not having heirs of his body, or by not continuing sole; the estates which were respectively vested in each grantee are wholly determined and void.

[g] Co. Litt. 201.
[h] Show. Parl. Cas. 83, &c.
[i] Co. Litt. 217.
[k] Litt. § 825.
[l] See pag. 109, 110, 111.

A distinction is however made between a *condition in deed* and a *limitation*, which Littleton [m] denominates also a *condition in law*. For when an estate is so expressly confined and limited by the words of it's creation, that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail, this is denominated a *limitation*: as when land is granted to a man *so long as* he is parson of Dale, or *while* he continues unmarried, or *until* out of the rents and profits he shall have made 500*l.* and the like [n]. In such case the estate determines as soon as the contingency happens (when he ceases to be parson, marries a wife, or has received the 500*l.*), and the next subsequent estate, which depends upon such determination, becomes immediately vested, without any act to be done by him who is next in expectancy. But when an estate is, strictly speaking, upon *condition in deed* (as if granted expressly *upon condition* to be void upon the payment of 40*l.* by the grantor or *so that* the grantee continues unmarried, or *provided* he goes to York, *&c.* [o], the law permits it to endure beyond the time when such contingency happens, unless the grantor or his heirs or assigns take advantage of the breach of the condition, and make either an entry or a claim in order to avoid the estate [p]. Yet, though strict words of condition be used in the creation of the estate, if on breach of the condition the estate be limited over to a third person, and does not immediately revert to the grantor or his representatives (as if an estate be granted by A to B, on condition that within two years B intermarry with C, and on failure thereof then to D and his heirs), this the law construes to be a limitation and
[156] not a condition [q]: because if it were a condition, then, upon the breach thereof, only A or his representatives could avoid the estate by entry, and so D's remainder might be defeated by their neglecting to enter: (2) but when it is a limitation,

[m] § 380. 1 Inst. 234.
[n] 10 Rep. 41.
[o] *Ibid.* 42.
[p] Co. Litt. 214 b. Stat. 32 Hen. VIII. c. 34.
[q] 1 Ventr. 202.

(2) D's remainder would be equally defeated by the entry of A, or his representatives, for that would defeat the livery made on the creation of the estates, and, of course, annul every estate then created. Litt. s. 347. Fearne, Con. Rem. 261. 6th Ed

the estate of B determines, and that of D commences, and he may enter on the lands, the instant that the failure happens. So also, if a man by his will devises land to his heir at law, on condition that he pays a sum of money, and for non-payment devises it over, this shall be considered as a limitation; otherwise no advantage could be taken of the nonpayment, for none but the heir himself could have entered for a breach of the condition [r]. (3)

In all these instances, of limitations or conditions subsequent, it is to be observed, that so long as the condition, either express or implied, either in deed or in law, remains unbroken, the grantee may have an estate of freehold, provided the estate upon which such condition is annexed be in itself of a freehold nature; as if the original grant express either an estate of inheritance, or for life; or no estate at all, which is constructively an estate for life. For, the breach of these conditions being contingent and uncertain, this uncertainty preserves the freehold [s]; because the estate is capable to last for ever, or at least for the life of the tenant, supposing the condition to remain unbroken. But where the estate is at the utmost a chattel interest, which must determine at a time certain, and may determine sooner (as a grant for ninety-nine years, provided A, B, and C, or the survivor of them, shall so long live), this still continues a mere chattel, and is not, by such it's uncertainty, ranked among estates of freehold.

These express conditions, if they be *impossible* at the time of their creation, or afterwards become impossible by the act of God or the act of the feoffor himself, or if they be *contrary to law*, or *repugnant* to the nature of the estate, are void.

[r] Cro. Eliz. 205. 1 Roll. Abr. 411. [s] Co. Litt. 42.

(3) It has been observed, that all conditional limitations in wills may be reduced to the head of executory devises, or of contingent remainders, (see post, c. 11.). Thus in the instance put, the land is devised in fee to the heir at law, but a fee or some lesser estate is limited over to some one else on the non-performance of a particular condition. This answers to the second class of executory devises put (post, p. 173.) See *Goodtitle* v. *Billington*, Douglas, Rep. n. 755, 756. a. Fearne, Con. Rem. 17. 6th ed.

In any of which cases, if they be conditions *subsequent*, that
[157] is, to be performed after the estate is vested, the estate shall become absolute in the tenant. As, if a feoffment be made to a man in fee-simple, on condition that unless he goes to Rome in twenty-four hours; or unless he marries with Jane S. by such a day; (within which time the woman dies, or the feoffor marries her himself;) or unless he kills another; or in case he alienes in fee; that then and in any of such cases the estate shall be vacated and determine: here the condition is void, and the estate made absolute in the feoffee. For he hath by the grant the estate vested in him, which shall not be defeated afterwards by a condition either impossible, illegal, or repugnant [t]. But if the condition be *precedent*, or to be performed before the estate vests, as a grant to a man that, if he kills another or goes to Rome in a day, he shall have an estate in fee; here, the void condition being precedent, the estate which depends thereon is also void, and the grantee shall take nothing by the grant: for he hath no estate until the condition be performed [u].

There are some estates defeasible upon condition snbsequent, that require a more peculiar notice. Such are,

III. Estates held *in vadio*, in *gage*, or pledge: which, are of two kinds, *vivum vadium*, or living pledge: and *mortuum vadium*, dead pledge, or *mortgage*.

Vivum *vadium*, or living pledge, is when a man borrows a sum (suppose 200*l.*) of another; and grants him an estate, as of 20*l.* *per annum*, to hold till the rents and profits shall repay the sum so borrowed. This is an estate conditioned to be void, as soon as such sum is raised. And in this case the land or pledge is said to be living: it subsists, and survives the debt: and immediately on the discharge of that, results back to the borrower [w]. But *mortuum vadium*, a dead pledge, or *mortgage* (which is much more common than the other), is where a man borrows of another a specific sum (*e. g.* 200*l.*)
[158] and grants him an estate in fee, on condition that if he, the mortgagor, shall repay the mortgagee the said sum of 200*l.*

[t] Co Litt. 206. [u] *Ibid.* [w] *Ibid.* 205.

on a certain day mentioned in the deed, then the mortgagor may re-enter on the estate so granted in pledge; or, as is now the more usual way, then the mortgagee shall reconvey the estate to the mortgagor; in this case, the land, which is so put in pledge, is by law, in case of non-payment at the time limited, for ever dead and gone from the mortgagor; and the mortgagee's estate in the lands is then no longer conditional, but absolute. But, so long as it continues conditional, that is, between the time of lending the money, and the time allotted for payment, the mortgagee is called tenant in mortgage [x]. But as it was formerly a doubt [y], whether, by taking such estate in fee, it did not become liable to the wife's dower, and other incumbrances, of the mortgagee, (though that doubt has been long ago overruled by our courts of equity [z],) it therefore became usual to grant only a long term of years by way of mortgage; with condition to be void on repayment of the mortgage money: (4) which course has been since pretty generally continued, principally because on the death of the mortgagee such term becomes vested in his personal representatives, who alone are entitled in equity to receive the money lent, of whatever nature the mortgage may happen to be. (5)

[x] Litt. § 332.
[y] *Ibid.* § 357. Cro. Car. 191.
[z] Hardr. 466.

(4) Another mode of obviating the same consequences, was by granting the estate to the mortgagee jointly with some other person, which, upon the principles stated at p. 131. n. (9), prevented the liability to dower and other incumbrances. Cro. Car. 191. "In mortgages for years, however, there is this defect, that upon fore-closure the mortgagee gets only a term. To guard against which, it has been thought adviseable to make the mortgagor covenant that, on non-payment of the money, he will not only confirm the term, but convey the freehold and inheritance to the mortgagee, or as he shall appoint, discharged of all equity of redemption." Butler's n. 96. Co. Litt. 205. a.

(5) Because in equity the mortgagee, even though in fee, is considered as holding the lands only as a pledge or security for the re-payment of his money; and, to carry on the same principle, equity regards such mortgagee's interest as personal estate. Butler's note, 96. Co. Litt. 205. a. On the other hand the mortgagor's equity of redemption is considered an actual estate, with all the properties and incidents of a real estate, subject to devise, intail, tenancy by the curtesy, &c. The mortgagor's possession, however, after non-payment, is by the permission only of the mortgagee; he

As soon as the estate is created, the mortgagee may immediately enter on the lands; but is liable to be dispossessed, upon performance of the condition by payment of the mortgage-money at the day limited. And therefore the usual way is to agree that the mortgagor shall hold the land till the day assigned for payment; when, in case of failure, whereby the estate becomes absolute, the mortgagee may enter upon it and take possession, without any possibility *at law* of being afterwards evicted by the mortgagor, to whom the land is now for ever dead. But here again the courts of equity interpose; and, though a mortgage be thus forfeited, and the
[159] estate absolutely vested in the mortgagee at the common law, yet they will consider the real value of the tenements compared with the sum borrowed. And, if the estate be of greater value than the sum lent thereon, they will allow the mortgagor at any reasonable time to recall or redeem his estate, paying to the mortgagee his principal, interest, and expenses: for otherwise, in strictness of law, an estate worth 1000*l.* might be forfeited for nonpayment of 100*l.*, or a less sum. This reasonable advantage, allowed to mortgagors, is called the *equity of redemption*; and this enables a mortgagor to call on the mortgagee, who has possession of his estate, to deliver it back and account for the rents and profits received, on payment of his whole debt and interest; thereby turning the *mortuum* into a kind of *vivum vadium.* (6) But, on the other hand, the mortgagee may either compel the sale of the estate, in order to get the whole of his money immediately; or else call upon the mortgagor to redeem his estate

---

may turn him out, or his tenant, on a lease granted subsequently to the mortgage, and may compel a tenant holding under a prior lease to pay him the rents. Fonblanque on Equity, ii. 258. See the cases, *Keech* v. *Hall*, Dougl. 21. *Moss* v. *Gallimore*, *ib.* 279.

(6) There is no time *positively limited* in equity which shall bar the right of redemption, the *general* rule is adopted from analogy to the time limited for entry on estates by 21 J. 1. c. 16., that is twenty years; but this rule is subject not only to the same exceptions as are to be found in that statute in favour of infants, *feme-coverts*, lunatics, &c., but to exceptions in all cases, where, from the behaviour of the parties within 20 years, it is clear that the property was considered only as a pledge for the debt; as if, for example, the mortgagee has within that time received or demanded interest. Fonblanque on Equity, ii. 264 267.

presently, or in default thereof, to be for ever *foreclosed* from redeeming the same; that is, to lose his equity of redemption without possibility of recall. And also, in some cases of fraudulent mortgages [a], the fraudulent mortgagor forfeits all equity of redemption whatsoever. It is not, however, usual for mortgagees to take possession of the mortgaged estate, unless where the security is precarious, or small; or where the mortgagor neglects even the payment of interest: when the mortgagee is frequently obliged to bring an ejectment, and take the land into his own hands in the nature of a pledge, or the *pignus* of the Roman law: whereas, while it remains in the hands of the mortgagor, it more resembles their *hypotheca*, which was, where the possession of the thing pledged remained with the debtor [b]. But by statute 7 Geo. II. c. 20. after payment or tender by the mortgagor of principal, interest, and costs, the mortgagee can maintain no ejectment; but may be compelled to re-assign his securities. In Glanvil's time, when the universal method of conveyance was by livery of seisin or corporal tradition of the lands, no gage or pledge of lands was good unless possession was also delivered [160] to the creditor; "*si non sequatur ipsius vadii traditio, curia* "*domini regis hujusmodi privatas conventiones tueri non solet:*" for which the reason given is, to prevent subsequent and fraudulent pledges of the same land; "*cum in tali casu possit* "*eadem res pluribus aliis creditoribus tum prius tum posterius* "*invadiari* [c]." And the frauds which have arisen since the exchange of these public and notorious conveyances for more private and secret bargains, have well evinced the wisdom of our antient law.

IV. A FOURTH species of estates, defeasible on condition subsequent, are those held by *statute merchant*, and *statute staple*; which are very nearly related to the *vivum vadium* before mentioned, or estate held till the profits thereof shall discharge a debt liquidated or ascertained. For both the statute merchant and statute staple are securities for money; the one entered into before the chief magistrate of some

[a] Stat. 4 & 5 W. & M. c. 16.

[b] *Pignoris appellatione eam propriè rem contineri dicimus, quæ simul etiam traditur creditori. At eam, quæ sine traditione nuda conventione tenetur, proprie hypothecæ appellatione contineri dicimus.* Inst. l. 4. t. 6. § 7.

[c] l. 10. c. 8.

trading town, pursuant to the statute 13 Edw. I. *de mercatoribus*, and thence called a statute merchant; the other pursuant to the statute 27 Edw. III. c. 9. before the mayor of the staple, that is to say, the grand mart for the principal commodities or manufactures of the kingdom, formerly held by act of parliament in certain trading towns [d], from whence this security is called a statute staple. They are both, I say, securities for debts acknowledged to be due; and originally permitted only among traders, for the benefit of commerce; whereby not only the body of the debtor may be imprisoned, and his goods seised in satisfaction of the debt, but also his lands may be delivered to the creditor, till out of the rents and profits of them the debt may be satisfied; and, during such time as the creditor so holds the lands, he is tenant by statute merchant or statute staple. There is also a similar security, the recognizance in the nature of a statute staple, acknowledged before either of the chief justices, or (out of term) before their substitutes, the mayor of the staple at Westminster and the recorder of London; whereby the benefit of this mercantile transaction is extended to all the king's
[161] subjects in general, by virtue of the statute 23 Hen. VIII. c. 6. amended by 8 Geo. I. c. 25., which directs such recognizances to be enrolled and certified into chancery. But these by the statute of frauds, 29 Car. II. c. 3. are only binding upon the lands in the hands of *bonâ fide* purchasers, from the day of their enrolment, which is ordered to be marked on the record.

V. Another similar conditional estate, created by operation of law, for security and satisfaction of debts, is called an estate by *elegit*. What an *elegit* is, and why so called, will be explained in the third part of these commentaries. At present I need only mention, that it is the name of a writ, founded on the statute [e] of Westm. 2., by which, after a plaintiff has obtained judgment for his debt at law, the sheriff gives him possession of one half of the defendant's lands and tenements, to be occupied and enjoyed until his debt and damages are fully paid; and during the time he so holds them, he is called tenant by *elegit*. It is easy to observe,

[d] See Book I. c. 8.

[e] 13 Ed. I. c. 18.

that this is also a mere conditional estate, defeasible as soon as the debt is levied. But it is remarkable, that the feodal restraints of alienating lands, and charging them with the debts of the owner, were softened much earlier and much more effectually for the benefit of trade and commerce, than for any other consideration. Before the statute of *quia emptores*, [f], it is generally thought that the proprietor of lands was enabled to alienate no more than a moiety of them: the statute therefore of Westm. 2. permits only so much of them to be affected by the process of law, as a man was capable of alienating by his own deed. But by the statute *de mercatoribus*, (passed in the same year [g]) the whole of a man's lands was liable to be pledged in a statute merchant, for a debt contracted in trade; though only *half* of them was liable to be taken in execution for any other debt of the owner.

I SHALL conclude what I had to remark of these estates, by statute merchant, statute staple, and *elegit*, with the observ- [162]
ation of sir Edward Coke [h]. "These tenants have uncertain "interests in lands and tenements, and yet they have but "chattels and no freeholds;" (which makes them an exception to the general rule) "because though they may hold an "estate of inheritance, or for life, *ut liberum tenementum*, until "their debt be paid; yet it shall go to their executors: for *ut* "is similitudinary; and though to recover their estates, they "shall have the same remedy (by assise) *as* a tenant of the free-"hold shall have [i], yet it is but the similitude of a freehold, and "*nullum simile est idem*." (7) This indeed only proves them to be chattel interests, because they go to the executors, which is inconsistent with the nature of a freehold; but it does not assign the reason why these estates, in contradistinction to other uncertain interests, shall vest in the executors of the

[f] 18 Edw. I.
[g] 13 Edw I.
[h] 1 Inst. 42, 43.
[i] The words of the statute *de mercatoribus* are "*puisse porter bref de novele* "*dusseisine, auci sicum de franktene-*"*ment.*"

(7) This passage is put together from two places in Co. Litt., a good deal transposed and altered in parts; the words "estate of inheritance or for life" do not occur in the original, and I conceive that the fact of the land going to the executor, and not to the heir, shews that the estate can in no case be one of inheritance.

tenant and not the heir; which is probably owing to this; that, being a security and remedy provided for personal debts due to the deceased, to which debts the executor is entitled, the law has therefore thus directed their succession; as judging it reasonable from a principle of natural equity, that the security and remedy should be vested in those to whom the debts, if recovered, would belong. For upon the same principle, if lands be devised to a man's executor, until out of their profits the debts due from the testator be discharged, this interest in the lands shall be a chattel interest, and on the death of such executor shall go to *his* executors [k]: because they, being liable to pay the original testator's debts, so far as his assets will extend, are in reason entitled to possess that fund out of which he has directed them to be paid.

[k] Co. Litt. 42.

CHAPTER THE ELEVENTH.

OF ESTATES IN POSSESSION, REMAINDER, AND REVERSION.

HITHERTO we have considered estates solely with regard to their duration, or the *quantity of interest* which the owners have therein. We are now to consider them in another view; with regard to the *time of their enjoyment*, when the actual pernancy of the profits (that is, the taking, perception, or receipt, of the rents and other advantages arising therefrom) begins. Estates, therefore, with respect to this consideration, may either be in *possession*, or in *expectancy*: and of expectancies there are two sorts; one created by the act of the parties, called a *remainder*; the other by act of law, and called a *reversion*.

I. OF estates in *possession*, (which are sometimes called estates *executed*, whereby a present interest passes to and resides in the tenant, not depending on any subsequent circumstance or contingency, as in the case of estates *executory*,) there is little or nothing peculiar to be observed. All the estates we have hitherto spoken of are of this kind; for, in laying down general rules, we usually apply them to such estates as are then actually in the tenant's possession. But the doctrine of estates in expectancy contains some of the nicest and most abstruse learning in the English law. These will, therefore, require a minute discussion, and demand some degree of attention.

II. AN estate then in remainder may be defined to be, an [164]
estate limited to take effect and be enjoyed after another estate

is determined. (1) As if a man seised in fee-simple granteth lands to A for twenty years, and, after the determination of the said term, then to B and his heirs for ever: here A is tenant for years, remainder to B in fee. In the first place an estate for years is created or carved out of the fee, and given to A; and the residue or remainder of it is given to B. But both these interests are, in fact, only one estate; the present term of years and the remainder afterwards, when added together, being equal only to one estate in fee[a]. They are, indeed, different *parts*, but they constitute only one *whole*: they are carved out of one and the same inheritance: they are both created, and may both subsist, together; the one in possession, the other in expectancy. So if land be granted to A for twenty years, and after the determination of the said term to B for life; and after the determination of B's estate for life, it be limited to C and his heirs for ever: this makes A tenant for years, with remainder to B for life, remainder over to C in fee. Now here the estate of inheritance undergoes a division into three portions: there is first A's estate for years carved out of it; and after that B's estate for life; and then the whole that remains is limited to C and his heirs. And here also the first estate, and both the remainders, for life and in fee, are one estate only; being nothing but parts or portions of one entire inheritance: and if there were a hundred remainders, it would still be the same thing: upon a principle grounded in mathematical truth, that all the parts are equal, and no more than equal, to the whole. And hence also it is easy to collect, that no remainder can be limited after the grant of an estate in fee-simple[b]: because a fee-simple

[a] Co. Litt. 143. [b] Plowd. 29. Vaugh. 269.

(1) That is, determined according to the very nature and extent of its original limitation. Sometimes, in wills and conveyances to uses, a succeeding estate is made to take effect in possession upon the happening of an event before the *natural* determination of the prior estate; as, for example, A, tenant for life, provided that when C returns from Rome, the estate shall thenceforth immediately be to the use of B in fee. In this case B's estate is not strictly a remainder, because, if it were, it would be the residue only of the fee after A's estate for life, whereas on the return of C during A's life, it will take effect in destruction of that estate. Estates of this kind are called conditional limitations. See Fearne's Con. Rem. pp. 14. 17. 261. ed. 7.

is the highest and largest estate that a subject is capable of enjoying; and he that is tenant in fee hath in him the *whole* of the estate: a remainder therefore, which is only a portion, or residuary *part*, of the estate, cannot be reserved after the whole is disposed of. A particular estate, with all the remainders expectant thereon, is only one fee-simple: as 40*l.* is [165] part of 100*l.* and 60*l.* is the remainder of it: wherefore, after a fee-simple once vested, there can no more be a remainder limited thereon, than, after the whole 100*l.* is appropriated, there can be any residue subsisting.

THUS much being premised, we shall be the better enabled to comprehend the rules that are laid down by law to be observed in the creation of remainders, and the reasons upon which those rules are founded.

1. AND, first, there must necessarily be some particular estate, precedent to the estate in remainder[c]. As, an estate for years to A, remainder to B for life; or, an estate for life to A, remainder to B in tail. This precedent estate is called the *particular* estate, as being only a small part, or *particula*, of the inheritance; the residue or remainder of which is granted over to another. The necessity of creating this preceding particular estate, in order to make a good remainder, arises from this plain reason; that *remainder* is a relative expression, and implies that some part of the thing is previously disposed of: for where the whole is conveyed at once, there cannot possibly exist a remainder; but the interest granted, whatever it be, will be an estate in possession.

AN estate created to commence at a distant period of time, without any intervening estate, is therefore properly no remainder; it is the whole of the gift, and not a residuary part. And such future estates can only be made of chattel interests, which were considered in the light of mere contracts by the antient law[d], to be executed either now or hereafter, as the contracting parties should agree; but an estate of freehold must be created to commence immediately. For it is an antient rule of the common law, that an estate of freehold

[c] Co. Litt. 49. Plowd. 25. [d] Rnym. 151.

cannot be created to commence *in futuro;* but it ought to take effect presently either in possession or remainder[e]: because
[166] at common law no freehold in lands could pass without livery of seisin; which must operate either immediately, or not at all. It would therefore be contradictory, if an estate, which is not to commence till hereafter, could be granted by a conveyance which imports an immediate possession. Therefore, though a lease to A for seven years, to commence from next Michaelmas, is good; yet a conveyance to B of lands, to hold to him and his heirs for ever from the end of three years next ensuing, is void. So that when it is intended to grant an estate of freehold, whereof the enjoyment shall be deferred till a future time, it is necessary to create a previous particular estate, which may subsist till that period of time is completed; and for the grantor to deliver immediate possession of the land to the tenant of this particular estate, which is construed to be giving possession to him in remainder, since his estate and that of the particular tenant are one and the same estate in law. As, where one leases to A for three years, with remainder to B in fee, and makes livery of seisin to A; here by the livery the freehold is immediately created, and vested in B, during the continuance of A's term of years. The whole estate passes at once from the grantor to the grantees, and the remainder-man is seized of his remainder at the same time that the termor is possessed of his term. The enjoyment of it must indeed be deferred till hereafter; but it is to all intents and purposes an estate commencing *in praesenti*, though to be occupied and enjoyed *in futuro*.

As no remainder can be created without such a precedent particular estate, therefore the particular estate is said to *support* the remainder. But a lease at will is not held to be such a particular estate as will support a remainder over[f]. For an estate at will is of a nature so slender and precarious, that it is not looked upon as a portion of the inheritance; and a portion must first be taken out of it, in order to constitute a remainder. Besides, if it be a freehold remainder, livery of seisin must be given at the time of it's creation; and the entry of the grantor to do this determines the estate at will

[e] 5 Rep. 94. [f] 8 Rep. 75.

in the very instant in which it is made[g]: or if the remainder be a chattel interest, though perhaps the deed of creation might operate as a *future contract*, if the tenant for years be a party to it, yet it is void by way of *remainder*: for it is a separate independent contract, distinct from the precedent estate at will; and every remainder must be part of one and the same estate, out of which the preceding particular estate is taken[h]. And hence it is generally true, that if the particular estate is void in it's creation, or by any means is defeated afterwards, the remainder supported thereby shall be defeated also[i]: as where the particular estate is an estate for the life of a person not *in esse*[k]; or an estate for life upon condition, on breach of which condition the grantor enters and avoids the estate[l]; in either of these cases the remainder over is void.

2. A SECOND rule to be observed is this; that the remainder must commence or pass out of the grantor at the time of the creation of the particular estate[m]. As, where there is an estate to A for life, with remainder to B in fee: here B's remainder in fee passes from the grantor at the same time that seisin is delivered to A of his life estate in possession. And it is this which induces the necessity at common law of livery of seisin being made on the particular estate, whenever a *freehold* remainder is created. For, if it be limited even on an estate for years, it is necessary that the lessee for years should have livery of seisin, in order to convey the freehold from and out of the grantor, otherwise the remainder is void[n]. Not that the livery is necessary to strengthen the estate for years; but, as livery of the land is requisite to convey the freehold, and yet cannot be given to him in remainder without infringing the possession of the lessee for years, therefore the law allows such livery, made to the tenant of the particular estate, to relate and enure to him in remainder, as both are but one estate in law[o].

[g] Dyer, 18.
[h] Raym. 151.
[i] Co. Litt. 298.
[k] 2 Roll. Abr. 415.
[l] 1 Jon. 58.
[m] Litt. § 721. Powd. 25.
[n] Litt. § 60.
[o] Co. Litt 49.

3. A third rule respecting remainders is this: that the remainder must vest in the grantee during the continuance of the particular estate, or *eo instanti* that it determines[p]. As, if A be tenant for life, remainder to B in tail; here B's remainder is vested in him, at the creation of the particular estate to A for life: or if A and B be tenants for their joint lives, remainder to the survivor in fee; here, though during their joint lives, the remainder is vested in neither, yet on the death of either of them, the remainder vests instantly in the survivor: wherefore both these are good remainders. But, if an estate be limited to A for life, remainder to the eldest son of B in tail, and A dies before B hath any son; here the remainder will be void, for it did not vest in any one during the continuance, nor at the determination, of the particular estate: and even supposing that B should afterwards have a son, he shall not take by this remainder; for, as it did not vest at or before the end of the particular estate, it never can vest at all, but is gone for ever[q]. And this depends upon the principle before laid down, that the precedent particular estate, and the remainder, are one estate in law; they must, therefore, subsist and be *in esse* at one and the same instant of time, either during the continuance of the first estate, or at the very instant when that determines, so that no other estate can possibly come between them. For there can be no intervening estate between the particular estate, and the remainder supported thereby[r]: the thing supported must fall to the ground, if once it's support be severed from it.

It is upon these rules, but principally the last, that the doctrine of *contingent* remainders depends. For remainders are either *vested* or *contingent*. *Vested* remainders (or remainders *executed*, whereby a present interest passes to the party, though to be enjoyed *in futuro*) are where the estate is invariably fixed, to remain to a determinate person, after the
[169] particular estate is spent. As if A be tenant for twenty years, remainder to B in fee; here B's is a vested remainder, which nothing can defeat or set aside. (2)

[p] Plowd. 25. 1 Rep. 66. [r] 3 Rep. 21.
[q] 1 Rep. 138.

(2) The person entitled to a vested remainder has an immediate fixed right of future enjoyment, that is, *an estate in praesenti*, though it is only to

CONTINGENT or *executory* remainders (whereby no present interest passes) are where the estate in remainder is limited to take effect, either to a dubious and uncertain *person*, or upon a dubious and uncertain *event*; so that the particular estate may chance to be determined, and the remainder never take effect[s]. (3)

FIRST, they may be limited to a dubious and uncertain *person*. As if A be tenant for life, with remainder to B's eldest son (then unborn) in tail; this is a contingent remainder, for it is uncertain whether B will have a son or no: but the instant that a son is born, the remainder is no longer contingent, but vested. Though, if A had died before the contingency happened, that is, before B's son was born, the remainder would have been absolutely gone; for the particular estate was determined before the remainder could vest. Nay, by the strict rule of law, if A were tenant for life, remainder to his own eldest son in tail, and A died without issue born, but leaving his wife *enseint*, or big with child, and after his death a posthumous son was born, this son could not take the land by virtue of this remainder; for the particular estate

[s] 3 Rep. 20.

to take effect in possession and pernancy of the profits at a future period; and such an estate may be transferred, aliened, and charged much in the same manner as an estate in possession. Cruise Dig. tit. Remainder. c.1. s.9.

(3) Though undoubtedly it is a property of all contingent remainders, that it is uncertain whether they will ever take effect; yet, it is not that uncertainty which constitutes a remainder contingent, because every vested remainder for life or in tail is, and must be, liable to the same uncertainty, as the remainder man may die, or die without issue before the determination of the particular estate. The true criterion seems to be, whether there is a present capacity of taking effect in possession, if the particular estate were to determine; if there be, the remainder is vested, and not otherwise. Thus if there be a lease for life to A, and after the death of J. D. remainder to B in tail, while J.D. lives, B's remainder is contingent, because if A were then to die, there would be no capacity of it's taking effect in possession; but if J.D. were to die, living A, B's remainder would immediately become vested; and yet if B were also to die without issue, living A, it would never actually take effect at all. See Fearne, Con. Rem. p. 216. 7th edit.

The same rule applies to the estate so commonly created in settlements, of trustees to preserve contingent remainders; it is quite uncertain, and depends on a contingency, whether it will ever actually come into possession, yet it is a vested remainder. See p. 171.

determined before there was any person *in esse*, in whom the remainder could vest[t]. But, to remedy this hardship, it is enacted by statute 10 & 11 W. III. c. 16. that posthumous children shall be capable of taking in remainder, in the same manner as if they had been born in their father's lifetime: that is, the remainder is allowed to vest in them, while yet in their mother's womb[u]. (4)

This species of contingent remainders to a person not in being must however be limited to some one, that may by common possibility, or *potentia propinqua*, be *in esse* at or before the particular estate determines[w]. As if an estate be
[170] made to A for life, remainder to the heirs of B; now, if A dies before B, the remainder is at an end; for during B's life he has no heir, *nemo est haeres viventis*: but if B dies first, the remainder then immediately vests in his heir, who will be entitled to the land on the death of A. This is a good contingent remainder, for the possibility of B's dying before A is *potentia propinqua*, and therefore allowed in law[x]. But a remainder to the right heirs of B (if there be no such person as B *in esse*, is void[y]. For here there must two contingencies

[t] Salk. 227. 4 Mod. 282.
[u] See Vol. I. p. 130.
[w] 2 Rep. 51.
[x] Co. Litt. 378.
[y] Hob. 33.

(4) The case of *Reeve* v. *Long*, which is that referred to in the text, arose on a will, and in the argument for the posthumous son, it was not contended that he could take, *if* his estate was a contingent remainder, but that it was an executory devise, to which the rule did not apply, (see post, p. 173). The statute was passed on account of the dissatisfaction of the judges with the decision of the house of lords in his favour, a decision grounded rather on the hardship of the case than on legal principles. The statute merely speaks of marriage, or other settlements, and is silent as to wills; whether the lords thought that their decision had settled the law as to wills, and therefore that it was unnecessary, or whether the word was omitted from delicacy, as the insertion of it would have implied that their previous judgment was wrong; it is understood, however, that wills are included in it, or governed by the same rule. The words of the statute being that the posthumous child shall take "in the same manner" as if born in the life-time of the parent, he is entitled to the intermediate profits from the death of the parent; whereas where the birth of a posthumous child devests an estate which has descended on an heir at law, and such child takes by descent, the intermediate heir retains the profits.

happen: first, that such a person as B shall be born; and, secondly, that he shall also die during the continuance of the particular estate; which make it *potentia remotissima*, a most improbable possibility. (5) A remainder to a man's eldest son, who hath none (we have seen) is good, for by common possibility he may have one; but if it be limited in particular to his son John, or Richard, it is bad, if he have no son of that name; for it is too remote a possibility that he should not only have a son, but a son of a particular name[z]. A limitation of a remainder to a bastard before it is born, is not good[a]: for though the law allows the possibility of having bastards, it presumes it to be a very remote and improbable contingency. Thus may a remainder be contingent, on account of the uncertainty of the *person* who is to take it.

A REMAINDER may also be contingent, where the person to whom it is limited is fixed and certain, but the *event* upon which it is to take effect is vague and uncertain. As, where land is given to A for life, and in case B survives him, then with remainder to B in fee: here B is a certain person, but the remainder to him is a contingent remainder, depending upon a dubious event, the uncertainty of his surviving A. During the joint lives of A and B it is contingent; and if B dies first, it never can vest in his heirs, but is for ever gone; but if A dies first, the remainder to B becomes vested.

CONTINGENT remainders of either kind, if they amount to [171]
a freehold, cannot be limited on an estate for years, or any

[z] 2 Rep. 51. [a] Cro. Eliz. 509.

(5) It is not merely there being two contingencies to happen, or what Lord Coke calls a possibility on a possibility, in order to the vesting of the estate, which will make the possibility too remote, but there must be some legal improbability in the contingencies. Mr. Butler mentions a case, *Routledge* v. *Dorril*, 2 Ves. jun. 357., where limitations of a money fund were held valid, and yet to entitle one of the objects to take under it, 1st. The husband and wife must have had a child; 2d. That child must have had a child; 3d. The last-mentioned child must have been alive at the decease of the survivor of his grandfather and grandmother; 4th. If a boy he must have attained twenty-one, if a girl that age, or married. Fearne, Con. Rem. 251., n. c. 7th Ed.

other particular estate, less than a freehold. Thus if land be granted to A for ten years, with remainder in fee to the right heirs of B, this remainder is void [b]; but if granted to A for life, with a like remainder, it is good. For, unless the freehold passes out of the grantor at the time when the remainder is created, such freehold remainder is void: it cannot pass out of him, without vesting somewhere; and in the case of a contingent remainder it must vest in the particular tenant, else it can vest no where; unless, therefore, the estate of such particular tenant be of a freehold nature, the freehold cannot vest in him, and, consequently, the remainder is void. (6)

Contingent remainders may be *defeated*, by destroying or determining the particular estate upon which they depend, before the contingency happens whereby they become vested [c]. (7) Therefore when there is tenant for life, with divers remainders in contingency, he may, not only by his death, but by alienation, surrender, or other methods, destroy and determine his own life-estate before any of those remainders vest; the consequence of which is, that he utterly defeats them all. As, if there be tenant for life, with remainder to his eldest son unborn in tail, and the tenant for life, before any son is born, surrenders his life-estate, he by that means defeats the remainder in tail to his son: for his son not being *in esse*, when the particular estate determined, the

[b] 1 Rep. 130. [c] *Ibid.* 66. 135.

(6) But although every contingent freehold remainder must be supported by a preceding freehold, it is not necessary that such preceding estate continue in the *actual seisin* of its rightful tenant; it is sufficient if there subsists a right of entry to such preceding estate, at the time the remainder should vest. As if A be tenant for life, with a contingent remainder over, and be disseised, the right of entry, while it remains in him, will support the contingent remainders; but if the disseisor should die, and the property should descend on his heir at law during the life of A, A would lose his right of entry, and have only a right of action, which would not be enough to support the contingent remainders; for in that case it is a question whether the particular estate, on which the remainders depend, subsists or not, another estate being protected by the law till that question is decided. Fearne, Con. Rem. p. 286., 7th ed.

(7) Indeed any alteration in the preceding estate, which changes its quantity, *i. e.* its limited duration, will defeat the contingent remainder. Fearne, Con. Rem. p. 337., 7th ed.

remainder could not then vest; and, as it could not vest then, by the rules before laid down, it never can vest at all. In these cases, therefore, it is necessary to have trustees appointed to preserve the contingent remainders; in whom there is vested an estate in remainder for the life of the tenant for life, to commence when his estate determines. If, therefore, his estate for life determines otherwise than by his death, the estate of the trustees, for the residue of his natural life, will then take effect, and become a particular estate in possession, [172] sufficient to support the remainders depending in contingency. This method is said to have been invented by sir Orlando Bridgman, sir Geoffrey Palmer, and other eminent counsel, who betook themselves to conveyancing during the time of the civil wars; in order thereby to secure in family settlements a provision for the future children of an intended marriage, who before were usually left at the mercy of the particular tenant for life[d]: and when, after the Restoration, those gentlemen came to fill the first offices of the law, they supported this invention within reasonable and proper bounds, and introduced it into general use.

Thus the student will observe how much nicety is required in creating and securing a remainder; and I trust he will, in some measure, see the general reasons upon which this nicety is founded. It were endless to attempt to enter upon the particular subtleties and refinements, into which this doctrine, by the variety of cases which have occurred in the course of many centuries, has been spun out and subdivided: neither are they consonant to the design of these elementary disquisitions. I must not however omit, that in devises by last will and testament, (which, being often drawn up when the party is *inops consilii*, are always more favoured in construction than formal deeds, which are presumed to be made with great caution, fore-thought, and advice,) in these devises, I say, remainders may be created in some measure contrary to the rules before laid down: though our lawyers will not allow such dispositions to be strictly remainders; but call them by another name, that of *executory devises*, or devises hereafter to be executed.

[d] See Moor, 486. 2 Roll. Abr. 797. pl. 12. 2 Sid. 159. 2 Chan. Rep. 170.

An executory devise of lands is such a disposition of them by will, that thereby no estate vests at the death of the devisor, but only on some future contingency. (8) It differs from a remainder in three very material points: 1. That it needs not
[173] any particular estate to support it. 2. That by it a fee-simple, or other less estate, may be limited after a fee-simple. 3. That by this means a remainder may be limited of a chattel interest, after a particular estate for life created in the same.

1. The first case happens when a man devises a future estate to arise upon a contingency; and, till that contingency happens, does not dispose of the fee-simple, but leaves it to descend to his heir at law. As if one devises land to a feme-sole and her heirs, upon her day of marriage: here is, in effect, a contingent remainder, without any particular estate to support it; a freehold commencing *in futuro*. This limitation, though it would be void in a deed, yet is good in a will, by way of executory devise [e]. For, since by a devise a freehold may pass without corporal tradition or livery of seisin, (as it must do, if it passes at all,) therefore it may commence *in futuro*; because the principal reason why it cannot commence *in futuro* in other cases, is the necessity of actual seisin, which always operates *in praesenti*. And, since it may thus commence *in futuro*, there is no need of a particular estate to support it; the only use of which is to make the remainder, by it's unity with the particular estate, a present interest. And hence also it follows, that such an executory devise, not being a present interest, cannot be barred by a recovery, suffered before it commences. [f]

2. By executory devise, a fee, or other less estate, may be limited after a fee. And this happens where a devisor de-

[e] 1 Sid. 153. [f] Cro. Jac. 593.

(8) Mr. Fearne observes upon the inaccuracy of a similar definition to this, that it is capable of comprehending more than the thing defined, for a contingent remainder created by will would exactly answer to it. He defines an executory devise thus — "Such a limitation of a future estate or interest in lands or chattels (though in the case of chattels personal it is more properly an executory bequest) as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law" Con Rem. 386. 7th Ed.

vises his whole estate in fee, but limits a remainder thereon to commence on a future contingency. As if a man devises land to A and his heirs; but, if he dies before the age of twenty-one, then to B and his heirs; this remainder, though void in a deed, is good by way of executory devise [g]. But, in both these species of executory devises, the contingencies ought to be such as may happen within a reasonable time; as within one or more life or lives in being, or within a moderate term of years, for courts of justice will not indulge even [174] wills, so as to create a perpetuity, which the law abhors [h]; because by perpetuities, (or the settlement of an interest, which shall go in the succession prescribed, without any power of alienation [i],) estates are made incapable of answering those ends of social commerce, and providing for the sudden contingencies of private life, for which property was at first established. The utmost length that has been hitherto allowed for the contingency of an executory devise of either kind to happen in, is that of a life or lives in being, and one-and-twenty years afterwards. As when lands are devised to such unborn son of a feme-covert, as shall first attain the age of twenty-one, and his heirs; the utmost length of time that can happen before the estate can vest, is the life of the mother and the subsequent infancy of her son: and this hath been decreed to be a good executory devise [k]. (9)

3. By executory devise a term of years may be given to one man for his life, and afterwards limited over in remainder to another, which could not be done by deed; for by law

[g] 2 Mod. 289.
[h] 12 Mod. 287. 1 Vern. 164.
[i] Salk. 229.
[k] Fort. 232.

(9) This is not a period arbitrarily fixed; but as an executory devise is only an indulgence shewn to testators, who have failed in the formal creation of that estate, (a contingent remainder,) which they lawfully might have created, the courts of law will not suffer it to exceed the limitations of a common-law conveyance. Now in marriage settlements an estate may be limited to the first and other sons of the marriage in tail, which only renders it unalienable, in fact, for a life or lives in being, twenty-one years afterwards, and the fraction of another year allowed for the period of gestation. This, therefore, is the limit of time, within which an executory devise to be good must happen; and the fraction of a year for gestation is, in fact, hardly an addition, as the infant *en ventre sa mere*, is in law a life in being. See *Long* v. *Blackall*, 7 T.R. 100.

the first grant of it, to a man for life, was a total disposition of the whole term; a life-estate being esteemed of a higher and larger nature than any term of years[l]. And, at first, the courts were tender, even in the case of a will, of restraining the devisee for life from aliening the term; but only held, that in case he died without exerting that act of ownership, the remainder over should then take place[m]: for the restraint of the power of alienation, especially in very long terms, was introducing a species of perpetuity. But, soon afterwards, it was held[n], that the devisee for life hath no power of aliening the term, so as to bar the remainder-man (10): yet, in order to prevent the danger of perpetuities, it was settled[o], that though such remainders may be limited to as many persons successively as the devisor thinks proper,
[175] yet they must all be *in esse* during the life of the first devisee; for then all the candles are lighted and are consuming together, and the ultimate remainder is in reality only to that remainder-man who happens to survive the rest: and it was also settled, that such remainder may not be limited to take effect, unless upon such contingency as must happen (if at all) during the life of the first devisee[p]. (11)

[l] 8 Rep. 95.
[m] Bro. *tit. chattels*, 23. Dyer, 74.
[n] Dyer, 358. 8 Rep. 96.
[o] 1 Sid. 451.
[p] Skinn. 341. 3 P. Wms. 258.

(10) The same rule prevails in equity as to executory bequests of personal chattels, and that equally, whether the form of the bequest gives the thing itself to the first legatee, or only the use of the thing. Fearne, Con. Rem. pp. 401. 404. 406., 7th ed.

(11) Peter Thelusson, Esq., an eminent merchant, devised the bulk of an immense property to trustees, for the purpose of accumulation during the lives of three sons, and of all their sons who should be living at the time of his death, or be born in due time afterwards, and during the life of the survivor of them. Upon the death of this last, the fund is directed to be divided into three shares, one to the eldest male lineal descendant of each of his three sons; upon the failure of such a descendant, the share to go to the descendants of the other sons; and, upon failure of all such descendants, the whole to go to the sinking fund. When he died, he had three sons living, who had four sons living, and two twin-sons were born soon after. Upon calculation it appeared that at the death of the survivor of these nine, the fund would probably exceed nineteen millions; and upon the supposition of only one person to take, and a minority of ten years, that it would exceed thirty-two millions. It is evident that this extraordinary will

THUS much for such estates in expectancy, as are created by the express words of the parties themselves; the most intricate title in the law. There is yet another species, which is created by the act and operation of the law itself, and this is called a reversion.

III. AN estate in *reversion* is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him [q]. Sir Edward Coke [r] describes a reversion to be the returning of land to the grantor or his heirs after the grant is over. As, if there be a gift in tail, the reversion of the fee is without any special reservation, vested in the donor by act of law: and so also the reversion, after an estate for life, years, or at will, continues in the lessor. For the fee-simple of all lands must abide somewhere; and if he, who was before possessed of the whole, carves out of it any smaller estate, and grants it away, whatever is not so granted remains in him. A reversion is never, therefore, created by deed or writing, but arises from construction of law; a remainder can never be

[q] Co. Litt. 22. [r] 1 Inst. 142.

---

will was strictly within the limits laid down in the text; and it was accordingly sustained both in the court of chancery and in the house of lords. See 4 Ves. jun. 227., 11 Ves. jun. 112., 1 New Rep. 357.

This will, however, occasioned the passing of the 39 & 40 G. III. c. 98., by which are prohibited any settlements of property, real or personal, for entire or partial accumulation for any longer term than the life of the settler, the period of twenty-one years from his death, the minority of any person or persons living, or *en ventre sa mere* at the time of his death, or the minority of any persons who would be beneficially entitled to the profits under the settlement, if of full age. Any direction to accumulate beyond this, except for the purpose of paying debts, raising portions for children, or in case of the produce of timber, is declared void, and the profits are directed to be paid to such person as would have been entitled, if there were no such direction. In moving the judgment of the lords in Thelusson's case, Lord Eldon Ch. said of this act, which had passed between the decisions of the original case and the appeal, "That act was rather a matter of surprize upon me, and, perhaps, it is not one of the wisest legislative measures. But it must be remembered, that it expressly alters what it takes to have been the former law, and confines the power of accumulation to twenty-one years; but if your lordships were to exercise the power of accumulation in all the cases allowed by the act, the accumulation would be enormous." 1 N. R. 397.

limited, unless by either deed or devise. But both are equally transferrable, when actually vested, being both estates *in praesenti*, though taking effect *in futuro*.

The doctrine of reversions is plainly derived from the feodal constitution. For when a feud was granted to a man for life, or to him and his issue male, rendering either rent or other services; then, on his death or the failure of issue male, the feud was determined, and resulted back to the lord
[176] or proprietor, to be again disposed of at his pleasure. And hence the usual *incidents* to reversions are said to be *fealty* and *rent*. When no rent is reserved on the particular estate, fealty however results of course, as an incident quite inseparable, and may be demanded as a badge of tenure, or acknowledgment of superiority; being frequently the only evidence that the lands are holden at all. Where rent is reserved, it is also incident, though not inseparably so, to the reversion [s]. The rent may be granted away, reserving the reversion; and the reversion may be granted away, reserving the rent; by *special* words: but by a *general* grant of the reversion, the rent will pass with it, as incident thereunto; though by the grant of the rent generally the reversion will not pass. The incident passes by the grant of the principal, but not *e converso*: for the maxim of law is, "*accessorium non* "*ducit, sed sequitur, suum principale* [t]."

These *incidental* rights of the reversioner and the respective modes of descent, in which remainders very frequently differ from reversions, have occasioned the law to be careful in distinguishing the one from the other, however inaccurately the parties themselves may describe them. For if one, seised of a paternal estate in fee, makes a lease for life, with remainder to himself and his heirs, this is properly a mere reversion [u], to which rent and fealty shall be incident; and which shall only descend to the heirs of his father's blood, and not to his heirs general, as a remainder limited to him by a third person would have done [w]: for it is the old estate, which was originally in him, and never yet was out of

[s] Co. Litt. 143.
[t] *Ibid.* 151, 152.
[u] Cro. Eliz. 321.
[w] 3 Lev. 407.

him. And so likewise, if a man grants a lease for life to A, reserving rent, with reversion to B and his heirs, B hath a remainder descendible to his heirs general, and not a reversion to which the rent is incident; but the grantor shall be entitled to the rent, during the continuance of A's estate [x].

[177]

In order to assist such persons as have any estate in remainder, reversion, or expectancy, after the death of others, against fraudulent concealments of their deaths, it is enacted by the statute 6 Ann. c. 18. that all persons on whose lives any lands or tenements are holden, shall (upon application to the court of chancery, and order made thereupon) once in every year, if required, be produced to the court, or it's commissioners; or, upon neglect or refusal, they shall be taken to be actually dead, and the person entitled to such expectant estate may enter upon and hold the lands and tenements, till the party shall appear to be living.

Before we conclude the doctrine of remainders and reversions, it may be proper to observe, that whenever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate [y], the less is immediately annihilated; or, in the law phrase, is said to be *merged*, that is, sunk or drowned in the greater. Thus, if there be tenant for years, and the reversion in fee-simple descends to or is purchased by him, the term of years is merged in the inheritance, and shall never exist any more. But they must come to one and the same person in one and the same right; else, if the freehold be in his own right, and he has a term in right of another (*en auter droit*), there is no merger. Therefore, if tenant for years dies, and makes him who hath the reversion in fee his executor, whereby the term of years vests also in him, the term shall not merge; for he hath the fee in his own right, and the term of years in the right of the testator, and subject to his debts and legacies. So also, if he who hath the reversion in fee marries the tenant for years, there is no merger; for he hath the inheritance in his own right, the lease in the right of his wife [z]. An estate-tail

[x] 1 And. 23.
[y] 3 Lev. 437.
[z] Plow. 418. Cro. Jac. 275. Co. Litt. 338.

is an exception to this rule: for a man may have in his own right both an estate tail and a reversion in fee; and the estate-tail, though a less estate, shall not merge in the fee [a]. For estates-tail are protected and preserved from merger by the
[178] operation and construction, though not by the express words, of the statute *de donis:* which operation and construction have probably arisen upon this consideration; that, in the common cases of *merger* of estates for life or years by uniting with the inheritance, the particular tenant hath the sole interest in them, and hath full power at any time to defeat, destroy, or surrender them to him that hath the reversion; therefore, when such an estate unites with the reversion in fee, the law considers it in the light of a virtual surrender of the inferior estate [b]. But, in an estate-tail, the case is otherwise: the tenant for a long time had no power at all over it, so as to bar or to destroy it, and now can only do it by certain special modes, by a fine, a recovery, and the like [c]: it would therefore have been strangely improvident to have permitted the tenant in tail, by purchasing the reversion in fee, to merge his particular estate, and defeat the inheritance of his issue; and hence it has become a maxim, that a tenancy in tail, which cannot be surrendered, cannot also be merged in the fee.

[a] 2 Rep. 61. 8 Rep. 74.
[b] Cro. Eliz. 302.
[c] See page 116.

CHAPTER THE TWELFTH.

OF ESTATES IN SEVERALTY, JOINT-TENANCY, COPARCENARY, AND COMMON.

WE come now to treat of estates, with respect to the number and connexions of their owners, the tenants who occupy and hold them. And, considered in this view, estates of any quantity or length of duration, and whether they be in actual possession or expectancy, may be held in four different ways; in severalty, in joint-tenancy, in coparcenary, and in common. (1)

I. HE that holds lands or tenements in *severalty*, or is sole tenant thereof, is he that holds them in his own right only, without any other person being joined or connected with him in point of interest, during his estate therein. This is the most common and usual way of holding an estate; and, therefore, we may make the same observations here that we did upon estates in possession, as contradistinguished from those in expectancy, in the preceding chapter: that there is little or nothing peculiar to be remarked concerning it, since all estates are supposed to be of this sort, unless where they are expressly declared to be otherwise; and that in laying down general rules and doctrines, we usually apply them to such estates as are held in severalty. I shall therefore proceed to consider the other three species of estates, in which there are always a plurality of tenants.

(1) This is not true as to coparcenary, see post, p. 188.

II. An estate in *joint-tenancy* is where lands or tenements are granted to two or more persons, to hold in fee-simple, fee-tail, for life, for years, or at will. In consequence of
[180] such grants an estate is called an estate in joint-tenancy [a], and sometimes an estate in *jointure*, which word as well as the other signifies an union or conjunction of interest; though in common speech the term *jointure* is now usually confined to that joint estate, which by virtue of the statute 27 Hen. VIII. c. 10. is frequently vested in the husband and wife before marriage, as a full satisfaction and bar of the woman's dower [b].

In unfolding this title, and the two remaining ones, in the present chapter, we will first inquire how these estates may be *created*; next, their *properties* and respective *incidents*; and lastly, how they may be *severed* or *destroyed*.

1. The *creation* of an estate in joint-tenancy depends on the wording of the deed or devise, by which the tenants claim title; for this estate can only arise by purchase or grant, that is, by the act of the parties, and never by the mere act of law. Now, if an estate be given to a plurality of persons, without adding any restrictive, exclusive, or explanatory words, as if an estate be granted to A and B and their heirs, this makes them immediately joint-tenants in fee of the lands. For the law interprets the grant so as to make all parts of it take effect, which can only be done by creating an equal estate in them both. As therefore the grantor has thus united their names, the law gives them a thorough union in all other respects. (2) For,

2. The *properties* of a joint estate are derived from it's unity, which is fourfold; the unity of *interest*, the unity of *title*, the unity of *time*, and the unity of *possession*; or, in

[a] Litt. 277. [b] See page 137.

(2) A grant to two or more without restrictive, exclusive, or explanatory words, will not create a joint estate, if either the grantees are unable to take, or the thing granted is not of a nature to be holden, according to the properties after mentioned in the text. Thus, a grant to two corporations will make them tenants in common, or a grant of a corody to two men is a grant of one to each. See Litt. s. 296. Co. Litt. 190. a.

other words, joint-tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.

First, they must have one and the same *interest*. One joint-tenant cannot be entitled to one period of duration or quantity of interest in lands, and the other to a different; one cannot be tenant for life, and the other for years; one [181] cannot be tenant in fee, and the other in tail [c]. But if land be limited to A and B for their lives, this makes them joint-tenants of the freehold; if to A and B and their heirs, it makes them joint-tenants of the inheritance [d]. If land be granted to A and B for their lives, and to the heirs of A; here A and B are joint-tenants of the freehold during their respective lives, and A has the remainder of the fee in severalty: or if land be given to A and B, and the heirs of the body of A; here both have a joint estate for life, and A hath a several remainder in tail [e]. Secondly, joint tenants must also have an unity of *title*: their estate must be created by one and the same act, whether legal or illegal; as by one and the same grant, or by one and the same disseisin [f]. Joint-tenancy cannot arise by descent or act of law; but merely by purchase, or acquisition by the act of the party: and, unless that act be one and the same, the two tenants would have different titles; and if they had different titles, one might prove good and the other bad, which would absolutely destroy the jointure. Thirdly, there must also be an unity of *time*: their estates must be vested at one and the same period, as well as by one and the same title. As in case of a present estate made to A and B; or a remainder in fee to A and B after a particular estate; in either case A and B are joint-tenants of this present estate, or this vested remainder. But if, after a lease for life, the remainder be limited to the heirs of A and B; and during the continuance of the particular estate A dies, which vests the remainder of one moiety in his heir; and then B dies, whereby the other moiety becomes vested in the heir of B: now A's heir and B's heir are not joint-tenants of this remainder, but tenants in common; for one

[c] Co. Litt. 188.
[d] Litt. § 277.
[e] Litt. § 285.
[f] *Ibid.* § 278.

moiety vested at one time, and the other moiety vested at another [f]. Yet where a feoffment was made to the use of a man, and such wife as he should afterwards marry, for term of their lives, and he afterwards married; in this case it seems to have been held that the husband and wife had a joint-
[182] estate, though vested at different times [g]: because the *use* of the wife's estate was in abeyance and dormant till the intermarriage; and, being then awakened, had relation back, and took effect from the original time of creation. (3) Lastly, in joint-tenancy there must be an unity of *possession*. Joint-tenants are said to be seised *per my et per tout*, by the *half* or *moiety*, and by *all*; that is, they each of them have the entire possession, as well of every *parcel* as of the *whole* [h]. They have not, one of them a seisin of one half or moiety, and the other of the other moiety; neither can one be exclusively seised of one acre, and his companion of another; but each has an undivided moiety of the whole, and not the whole of an undivided moiety [i]. And, therefore, if an estate in fee be given to a man and his wife, they are neither properly joint-tenants nor tenants in common: for husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seised of the entirety, *per tout, et non per my*; the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor [k]. (4)

[f] Co. Litt. 188.
[g] Dyer, 340. 1 Rep. 101.
[h] Litt. § 288. 5 Rep. 10.
[i] *Quilibet totum tenet et nihil tenet; scilicet, totum in communi, et nihil separatim per se.* Bract. *l.* 5. *tr.* 5. *c.* 26.
[k] Litt. § 665. Co. Litt. 187. Bro. *Abr. t. cui in vita*, 8. 2 Vern. 120. 2 Lev. 39.

(3) Mr. Hargrave, in a note on this case, which is also cited in Co. Litt. 183., assigns the reason for the difference, that in the case of the use, the estate is vested and settled in the feoffees, till the future use comes in *esse*. This reason is itself founded on a principle, which will make it intelligible, and serve to reconcile cases apparently at variance with each other; that it is not so much a vesting at the same time, as a joint claim under the same conveyance, which will make a joint estate. See *Earl of Sussex* v. *Temple*, 1 Ld. Ray, 311. *Hatterley* v. *Jackson*, 2 Str. 1172. Fearne, Con. Rem. p. 315., 7th ed.

(4) And for the same reason, "if a joynt estate be made of land to a husband

Upon these principles, of a thorough and intimate union of interest and possession, depend many other consequences and incidents to the joint-tenant's estate. If two joint-tenants let a verbal lease of their land, reserving rent to be paid to one of them, it shall enure to both, in respect of the joint-reversion [l]. If their lessee surrenders his lease to one of them, it shall also enure to both, because of the privity, or relation of their estate [m]. On the same reason, livery of seisin, made to one joint-tenant, shall enure to both of them [n]: and the entry, or re-entry, of one joint-tenant is as effectual in law as if it were the act of both [o]. In all actions also relating to their joint-estate, one joint-tenant cannot sue or be sued without joining the other [p]. But if two or more joint-tenants be seised of an advowson, and they present [183] different clerks, the bishop may refuse to admit either: because neither joint-tenant hath a several right of patronage, but each is seised of the whole; and, if they do not both agree within six months, the right of presentation shall lapse. But the ordinary may, if he pleases, admit a clerk presented by either, for the good of the church, that divine service may be regularly performed; which is no more than he otherwise would be entitled to do, in case their disagreement continued, so as to incur a lapse: and, if the clerk of one joint-tenant be so admitted, this shall keep up the title in both of them; in respect of the privity and union of their estate [q]. Upon the same ground it is held, that one joint-tenant cannot have an action against another for trespass, in respect of his land [r]; for each has an equal right to enter on any part of it. But one joint-tenant is not capable by himself to do any act, which may tend to defeat or injure the estate of the other; as to let leases, or to grant copyholds [s]: and, if any waste be done, which tends to the destruction of the inheritance, one joint-tenant may have an action of waste against the other, by

[l] Co. Litt. 214.
[m] *Ibid.* 192.
[n] *Ibid.* 49.
[o] *Ibid.* 319. 364.
[p] Co. Litt. 195.
[q] *Ibid.* 186.
[r] 3 Leon. 262.
[s] 1 Leon. 234.

husband and wife, and to a third person, in this case the husband and wife have in law in their right but the moity, and the third person shall have as much as the husband and wife, viz. the other moity." Litt. s. 291.

construction of the statute Westm. 2. c. 22. [t] So too, though at common law no action of account lay for one joint-tenant against another, unless he had constituted him his bailiff or receiver [u], yet now by the statute 4 Ann. c 16. joint-tenants may have actions of account against each other, for receiving more than their due share of the profits of the tenements held in joint-tenancy.

From the same principle also arises the remaining grand incident of joint-estates; *viz.* the doctrine of *survivorship*: by which when two or more persons are seised of a joint-estate, of inheritance, for their own lives, or *pur auter vie*, or are jointly possessed of any chattel-interest, the entire tenancy upon the decease of any of them remains to the survivors, and at length to the last survivor; and he shall be entitled to the whole estate, whatever it be, whether an inheritance or
[184] a common freehold only, or even a less estate [w]. This is the natural and regular consequence of the union and entirety of their interest. The interest of two joint-tenants is not only equal or similar, but also is one and the same. One has not originally a distinct moiety from the other; but, if by any subsequent act (as by alienation or forfeiture of either) the interest becomes separate and distinct, the joint-tenancy instantly ceases. But, while it continues, each of two joint-tenants has a concurrent interest in the whole; and, therefore, on the death of his companion, the sole interest in the whole remains to the survivor. For the interest which the survivor originally had is clearly not devested by the death of his companion; and no other person can now claim to have a *joint* estate with him, for no one can now have an interest in the whole, accruing by the same title, and taking effect at the same time with his own; neither can any one claim a *separate* interest in any part of the tenements; for that would be to deprive the survivor of the right which he has in all, and every part. As, therefore, the survivor's original interest in the whole still remains; and as no one can now be admitted, either jointly or severally, to any share with him therein; it follows, that his own interest must now be entire and several,

[t] 2 Inst. 403.
[u] Co. Litt. 200.
[w] Litt. § 280, 281.

and that he shall alone be entitled to the whole estate (whatever it be) that was created by the original grant.

This right of survivorship is called by our antient authors[x] the *jus accrescendi*, because the right upon the death of one joint-tenant accumulates and increases to the survivors: or, as they themselves express it, "*pars illa communis accrescit* "*superstitibus, de persona in personam, usque ad ultimam su-* "*perstitem.*" And this *jus accrescendi* ought to be mutual; which I apprehend to be one reason why neither the king[y] nor any corporation[z], can be a joint-tenant with a private person. For here is no mutuality: the private person has not even the remotest chance of being seised of the entirety, by benefit of survivorship; for the king and the corporation can never die. (5)

3. We are, lastly, to inquire how an estate in joint-tenancy [185] may be *severed* and *destroyed*. And this may be done by destroying any of its constituent unities. 1. That of *time*, which respects only the original commencement of the joint-estate, cannot indeed (being now past) be affected by any subsequent transactions. But, 2. The joint-tenants' estate may be destroyed, without any alienation, by merely disuniting their *possession*. For joint-tenants being seised *per my et*

[x] Bracton. *l.* 4. *tr.* 3. *c.* 9 § 3. Fleta, *l.* 3. *c.* 4.

[y] Co. Litt. 190. Finch. L. 83.

[z] 2 Lev. 12.

(5) This is not the reason assigned by the authors cited in the margin of the text; and the disability to hold jointly not only exists between a corporation and an individual, but also between two corporations, which are perfectly on equal footing as to the possibility of survivorship. Co. Litt. 190. a. Indeed, mutuality of survivorship is stated in terms by Lord Coke, not to be an inseparable incident to joint tenancy; and he puts a case of a lease to A & B for the life of A: here, if B dies first, A has all by survivorship, but if A dies first, B has nothing; yet they are joint tenants. Co. Litt. 181. b. With respect to partners in trade, survivorship does not hold; "an exception is to be made of two joynt merchants, for the wares, merchandizes, debts or duties, that they have as joint merchants or partners, shall not survive, but shall goe to the executors of him that deceaseth; and this is *per legem mercatoriam*, which is part of the lawes of this realm, for the advancement and continuance of commerce and trade" Co. Litt 182.

per tout, every thing that tends to narrow that interest, so that they shall not be seised throughout the whole, and throughout every part, is a severance or destruction of the jointure. And therefore, if two joint-tenants agree to part their lands, and hold them in severalty, they are no longer joint-tenants: for they have now no joint-interest in the whole, but only a several interest respectively in the several parts. And for that reason also, the right of survivorship is by such separation destroyed [a]. By common law all the joint-tenants might agree to make partition of the lands, but one of them could not compel the other so to do [b]: for this being an estate originally created by the act and agreement of the parties, the law would not permit any one or more of them to destroy the united possession without a similar universal consent. But now by the statutes 31 Hen. VIII. c. 1. and 32 Hen. VIII. c. 32. joint-tenants, either of inheritances or other less estates, are compellable by writ of partition to divide their lands [c]. (6) 3. The jointure may be destroyed by

[a] Co. Litt. 188. 193.

[b] Litt. § 290.

[c] Thus, by the civil law, *nemo invitus compellitur ad communionem*, (*Ff.* 12. 6. 26. § 4.) And again; *si non omnes qui rem communem habent, sed certi ex his, dividere desiderant; hoc judicium inter eos accipi potest.* (*Ff.* 10. 3. 8.)

(6) In proceedings under these statutes, there are two judgments, 1st. That a partition be made between the parties aforesaid of the tenements aforesaid with the appurtenances. Upon which a judicial writ issues to the sheriff, which, reciting the first writ of partition, and first judgment, commands him to go to the spot with a jury, and in the presence of the parties (if they choose to appear on due summons), to make equal and fair partition; and then to return the writ, and what he shall have done under it. Upon the return, the court gives the second judgment, that the partition made be kept firm and stable for ever. Booth, p. 245. Litt. s. 248.

There were great delays and difficulties in these proceedings, which occasioned the statute of 8 & 9 W. 3. c. 31. made perpetual by 3 & 4 Ann. c. 18. This statute introduced many salutary regulations: but resort is now seldom had to courts of law to effect a partition, for the courts of equity having entertained jurisdiction of such suits, and being enabled to effectuate the object more completely, parties in general prefer a bill of partition. This is one of the many instances in which courts of equity have assumed to themselves jurisdiction, though there was a remedy at law, partly, perhaps, because their remedy was more complete, partly because a multiplicity of suits among several parties was prevented, and partly perhaps,

destroying the unity of *title*. As if one joint-tenant alienes and conveys his estate to a third person: here the joint-tenancy is severed, and turned into tenancy in common [d]; for the grantee and the remaining joint-tenant hold by different titles, (one derived from the original, the other from the subsequent, grantor,) though, till partition made, the unity of possession continues. But a devise of one's share by will is no severance of the jointure: for no testament takes effect [186] till after the death of the testator, and by such death the right of the survivor (which accrued at the original creation of the estate, and has therefore a priority to the other [e]) is already vested [f]. 4. It may also be destroyed by destroying the unity of *interest*. And therefore, if there be two joint-tenants for life, and the inheritance is purchased by or descends upon either, it is a severance of the jointure [g]; though, if an estate is originally limited to two for life, and after to the heirs of one of them, the freehold shall remain in jointure, without merging in the inheritance; because, being created by one and the same conveyance, they are not separate estates, (which is requisite in order to a merger,) but branches of one entire estate [h]. In like manner, if a joint-tenant in fee makes a lease for life of his share, this defeats the jointure [i]: for it destroys the unity both of title and of interest. And, whenever or by whatever means the jointure ceases or is severed, the right of survivorship, or *jus accrescendi*, the same instant ceases with it [k]. Yet, if one of three joint-tenants alienes

[d] Litt. § 292.

[e] *Jus accrescendi praefertur ultimae voluntati.* Co. Litt. 185.

[f] Litt. § 287

[g] Cro. Eliz. 470.

[h] 2 Rep. 60. Co. Litt. 182.

[i] Litt. § 302, 303.

[k] *Nihil de re accrescit ei, qui nihil in re, quando jus accresceret, habet.* Co Litt. 188.

---

perhaps, on less intelligible grounds. The remedy is more complete in this respect, that the court having ascertained all the rights, and divided the property by commissioners of its own, will decree the specific performance of the partition, and compel the parties to execute proper conveyances to each other of the shares allotted to them. But on this account the court will not be satisfied with the plaintiff's showing a mere seisin, or possession, as is the case with a court of law, but will call upon him to show a complete title, and if he fail in satisfying the court on that point, will leave him to seek his remedy at law. Mitf. Pl. p. 96. 3d ed. Cruise's Dig. tit. Joint-Tenancy, c. 2. s. 42. 44.

his share, the two remaining tenants still hold their parts by joint-tenancy and survivorship[l]: and if one of three joint-tenants release his share to one of his companions, though the joint-tenancy is destroyed with regard to that part, yet the two remaining parts are still held in jointure[m]; for they still preserve their original constituent unities. But when, by any act or event, different interests are created in the several parts of the estate, or they are held by different titles, or if merely the possession is separated; so that the tenants have no longer these four indispensable properties, a sameness of interest, and undivided possession, a title vesting at one and the same time, and by one and the same act or grant; the jointure is instantly dissolved.

[187] In general it is advantageous for the joint-tenants to dissolve the jointure; since thereby the right of survivorship is taken away, and each may transmit his own part to his own heirs. Sometimes however it is disadvantageous to dissolve the joint estate: as if there be joint-tenants for life, and they make partition, this dissolves the jointure; and, though before they each of them had an estate in the whole for their own lives and the life of their companion, now they have an estate in a moiety only for their own lives merely; and, on the death of either, the reversioner shall enter on his moiety[n]. And therefore if there be two joint-tenants for life, and one grants away his part for the life of his companion, it is a forfeiture[o]: for, in the first place, by the severance of the jointure he has given himself in his own moiety only an estate for his own life; and then he grants the same land for the life of another; which grant, by a tenant for his own life merely, is a forfeiture of his estate[p]: for it is creating an estate which may by possibility last longer than that which he is legally entitled to.

III. An estate held in *coparcenary* is where lands of inheritance descend from the ancestor to two or more persons. It *arises* either by common law or particular custom. By

[l] Litt. § 294.
[m] *Ibid.* § 304.
[n] 1 Jones, 55.
[o] 4 Leon. 236.
[p] Co. Litt. 252.

common law: as where a person seised in fee-simple or in fee-tail dies, and his next heirs are two or more females; his daughters, sisters, aunts, cousins, or their representatives: in this case they shall all inherit, as will be more fully shewn, when we treat of descents hereafter; and these co-heirs are then called *coparceners*; or, for brevity, *parceners* only [q]. Parceners by particular custom are where lands descend, as in gavelkind, to all the males in equal degree, as sons, brothers, uncles, &c.[r] And, in either of these cases, all the parceners put together make but one heir, and have but one estate among them[s]. (7)

THE *properties* of parceners are in some respects like those [188] of joint-tenants; they having the same unities of *interest*, *title*, and *possession*. They may sue and be sued jointly for matters relating to their own lands[t]; and the entry of one of them shall in some cases enure as the entry of them all[u]. They cannot have an action of trespass against each other: but herein they differ from joint-tenants, that they are also excluded from maintaining an action of waste[w]; for coparceners could at all times put a stop to any waste by writ of partition, but till the statute of Henry the eighth joint-tenants had no such power. Parceners also differ materially from joint-tenants in four other points. 1. They always claim by descent, whereas joint-tenants always claim by purchase. Therefore, if two sisters purchase lands, to hold to them

[q] Litt. § 241, 242.
[r] *Ibid.* § 265.
[s] Co. Litt. 163.
[t] Co. Litt. 164.
[u] *Ibid.* 188. 243.
[w] 2 Inst. 403.

(7) The passage in Coke upon Littleton referred to, does not quite warrant this conclusion as to parceners by custom; and indeed the words in Littleton, upon which it is a commentary, apply only to parceners at common law At p. 176. a. Lord Coke cites a passage from Bracton. L. 5. tr. v. c. 25. s. 2. which makes the same difference between parceners by common law, where the inheritance is one and undivided, and those by the custom where the inheritance is divided; he calls the latter *participes ratione ipsius rei quæ partibilis est, et non ratione personarum; quæ* non sunt quasi unus hæres, et unum corpus, *sed diversi hæredes, ubi tenementum partibile est inter plures cohæredes petentes, qui descendunt de eodem stipite et* semper solet dividi ab antiquo.

and their heirs, they are not parceners, but joint-tenants[x]; and hence it likewise follows, that no lands can be held in coparcenary, but estates of inheritance, which are of a descendible nature; whereas not only estates in fee and in tail, but for life or years, may be held in joint-tenancy. 2. There is no unity of *time* necessary to an estate in coparcenary. For if a man had two daughters, to whom his estate descends in coparcenary, and one dies before the other; the surviving daughter and the heir of the other, or when both are dead, their two heirs, are still parceners[y]; the estates vesting in each of them at different times, though it be the same quantity of interest, and held by the same title. 3. Parceners, though they have an *unity*, have not an *entirety* of interest. They are properly entitled each to the whole of a distinct moiety[z]; and of course there is no *jus accrescendi*, or survivorship, between them: for each part descends severally to their respective heirs, though the unity of possession continues. And as long as the lands continue in a course of descent, and united in possession, so long are the tenants therein, whether male or female, called parceners. But if the
[189] possession be once severed by partition, they are no longer parceners, but tenants in severalty; or if one parcener alienes her share, though no partition be made, then are the lands no longer held in *coparcenary*, but in *common*[a].

Parceners are so called, saith Littleton[b], because they may be constrained to make *partition*. And he mentions many methods of making it[c]; four of which are by consent, and one by compulsion. The first is, where they agree to divide the lands into equal parts in severalty, and that each shall have such a determinate part. The second is, when they agree to chuse some friend to make partition for them, and then the sisters shall chuse each of them her part according to seniority of age; or otherwise, as shall be agreed. The privilege of seniority is in this case personal; for if the eldest sister be dead, her issue shall not chuse first, but the next sister. But, if an advowson descend in coparcenary, and the

[x] Litt. § 254.
[y] Co. Litt. 164. 174.
[z] *Ibid.* 163, 164.
[a] Litt. § 309.
[b] § 241.
[c] § 243 to 264.

sisters cannot agree in the presentation, the eldest and her issue, nay her husband, or her assigns, shall present alone, before the younger[d]. And the reason given is, that the former privilege, of priority in choice upon a division, arises from an act of her own, the agreement to make partition; and therefore is merely personal: the latter, of presenting to the living, arises from the act of the law, and is annexed not only to her person, but to her estate also. A third method of partition is, where the eldest divides, and then she shall chuse last; for the rule of law is, *cujus est divisio, alterius est electio.* The fourth method is, where the sisters agree to cast lots for their shares. And these are the methods by consent. That by compulsion is, where one or more sue out a writ of partition against the others; whereupon the sheriff shall go to the lands, and make partition thereof by the verdict of a jury there impanneled, and assign to each of the parceners her part in severalty[e]. (8) But there are some things which are [190] in their nature impartible. The mansion-house, common of estovers, common of piscary uncertain, or any other common without stint, shall not be divided (9); but the eldest sister, if she pleases, shall have them, and make the others a reasonable satisfaction in other parts of the inheritance: or, if that cannot be, then they shall have the profits of the thing by turns, in the same manner as they take the advowson[f].

THERE is yet another consideration attending the estate in coparcenary; that if one of the daughters has had an estate given with her in *frankmarriage* by her ancestor, (which we may remember was a species of estates-tail, freely given by a

[d] Co. Litt. 166. 3 Rep. 22.

[e] By statute 8 & 9 W. III. c. 31. an easier method of carrying on the proceedings on a writ of partition, of lands held either in joint-tenancy, parcenary, or common, than was used at the common law, is chalked out and provided.

[f] Co. Litt. 164. 165.

(8) See ante, 185. n. (6.) The application of parceners is entertained by a court of equity on the same footing as that of joint-tenants.

(9) Because, says Lord Coke, "that would be a charge to the tenant of the soile;" if two persons were to have a common without stint instead of one, it would, in fact, be doubled, and not divided; for strictly it could not be divided without losing its nature.

relation for advancement of his kinswoman in marriage[g],) in this case, if lands descend from the *same* ancestor to her and her sisters in fee-simple, she or her heirs shall have no share of them, unless they will agree to divide the lands so given in frankmarriage in equal proportion with the rest of the lands descending[h]. This mode of division was known in the law of the Lombards[i]; which directs the woman so preferred in marriage, and claiming her share of the inheritance, *mittere in confusum cum sororibus, quantum pater aut frater ei dederit, quando ambulaverit ad maritum.* With us it is denominated bringing those lands into *hotch-pot*[k]: which term I shall explain in the very words of Littleton[l]: "it seemeth that this "word *hotch-pot*, is in English a pudding; for in a pudding "is not commonly put one thing alone, but one thing with "other things together." By this housewifely metaphor our ancestors meant to inform us[m], that the lands, both those given in frankmarriage and those descending in fee-simple, should be mixed and blended together, and then divided in equal portions among all the daughters. But this was left to the choice of the donee in frankmarriage: and if she did not chuse to put her lands into hotch-pot, she was presumed to
[191] be sufficiently provided for, and the rest of the inheritance was divided among her other sisters. The law of hotch-pot took place then only, when the other lands descending from the ancestor were fee-simple; for if they descended in tail, the donee in frankmarriage was entitled to her share, without bringing her lands so given into hotch-pot[n]. And the reason is, because lands descending in fee-simple are distributed, by the policy of law, for the maintenance of all the daughters; and if one has a sufficient provision out of the same inheritance, equal to the rest, it is not reasonable that she should have more: but lands, descending in tail, are not distributed by the operation of the law, but by the designation of the giver, *per formam doni:* it matters not therefore how unequal this distribution may be. Also no lands, but such as are given in frankmarriage, shall be brought into hotch-pot; for no others are looked upon in law as given for the advance-

[g] See page 115.
[h] Bracton, *l.* 2. *c.* 34. Litt. § 266. to 273.
[i] *l.* 2. *t.* 14. *c.* 15.
[k] Britton, *c.* 72.
[l] § 267.
[m] Litt. § 268.
[n] *Ibid.* § 274.

ment of the woman, or by way of marriage-portion[o]. And, therefore, as gifts in frankmarriage are fallen into disuse, I should hardly have mentioned the law of hotch-pot, had not this method of division been revived and copied by the statute for distributiion of personal estates, which we shall hereafter consider at large.

THE estate in coparcenary may be *dissolved*, either by partition, which disunites the possession; by alienation of one parcener, which disunites the title, and may disunite the interest; or by the whole at last descending to and vesting in one single person, which brings it to an estate in severalty.

IV. TENANTS in *common* are such as hold by several and distinct titles, but by unity of possession; because none knoweth his own severalty, and therefore they all occupy promiscuously[p]. This tenancy therefore happens where there is a unity of possession merely, but perhaps an entire disunion of interest, of title, and of time. For if there be two tenants in common of lands, one may hold his part in fee-simple, the other in tail, or for life; so that there is no necessary unity of [192] interest: one may hold by descent, the other by purchase; or the one by purchase from A, the other by purchase from B; so that there is no unity of title; one's estate may have been vested fifty years, the other's but yesterday; so there is no unity of time. The only unity there is, is that of possession; and for this Littleton gives the true reason, because no man can certainly tell which part is his own: otherwise even this would be soon destroyed.

TENANCY in common may be created, either by the destruction of the two other estates, in joint-tenancy and coparcenary, or by special limitation in a deed. By the destruction of the two other estates, I mean such destruction as does not sever the unity of possession, but only the unity of title or interest: As, if one of two joint-tenants in fee alienes his estates for the life of the alienee, the alienee and the other joint-tenant are tenants in common; for they have now several titles, the other joint-tenant by the original grant, the alienee

[o] Litt. § 275. [p] *Ibid.* § 292.

by the new alienation[q]; and they also have several interests, the former joint-tenant in fee-simple, the alienee for his own life only. So, if one joint-tenant gives his part to A in tail, and the other gives his to B in tail, the donees are tenants in common, as holding by different titles, and conveyances[r]. If one of two parceners alienes, the alienee and the remaining parcener are tenants in common[s]; because they hold by different titles, the parcener by descent, the alienee by purchase. So likewise, if there be a grant to two *men*, or two *women*, and the heirs of their bodies, here the grantees shall be joint-tenants of the life-estate, but they shall have several inheritances; because they cannot possibly have one heir of their two bodies, as might have been the case had the limitation been to *a man and woman*, and the heirs of their bodies begotten[t]: and in this, and the like cases, their issue shall be tenants in common; because they must claim by different titles, one as heir of A, and the other as heir of B; and those
[193] two not titles by purchase, but descent. In short, whenever an estate in joint-tenancy or coparcenary is dissolved, so that there be no partition made, but the unity of possession continues, it is turned into a tenancy in common.

A TENANCY in common may also be created by express limitation in a deed: but here care must be taken not to insert words which imply a joint estate; and then if lands be given to two or more, and it be not joint-tenancy, it must be a tenancy in common. But the law is apt in its constructions to favour joint-tenancy rather than tenancy in common[u]; because the divisible services issuing from land (as rent, *&c.*) are not divided, nor the entire services (as fealty) multiplied, by joint-tenancy, as they must necessarily be upon a tenancy in common. Land given to two, to be holden the one moiety to one, and the other moiety to the other, is an estate in common[w]; and if one grants to another *half* his land, the grantor and grantee are also tenants in common[x]: because, as has been before[y] observed, joint-tenants do not take by distinct halves or moieties; and by

[q] Litt. § 292.
[r] *Ibid.* 295.
[s] *Ibid.* 309.
[t] *Ibid.* 283
[u] Salk. 392.
[w] Litt. § 298.
[x] *Ibid.* 299.
[y] See p 182.

such grants the division and severalty of the estate is so plainly expressed, that it is impossible they should take a joint-interest in the whole of the tenements. But a *devise* to two persons to hold *jointly and severally*, is said to be a joint-tenancy[z]; because that is necessarily implied in the word "jointly," the word "severally" perhaps only implying the power of partition: and an estate given to A and B, *equally to be divided* between them, though in *deeds* it hath been said to be a joint-tenancy[a], (for it implies no more than the law has annexed to that estate, *viz.* divisibility[b],) yet in *wills* it is certainly a tenancy in common[c]; because the devisor may be presumed to have meant what is most beneficial to both the devisees, though his meaning is imperfectly expressed. And this nicety in the wording of grants makes it the most usual as well as the safest way, when a tenancy in common is meant to be created, to add [194] express words of exclusion as well as description, and limit the estate to A and B, to hold *as tenants in common, and not as joint-tenants.*

As to the *incidents* attending a tenancy in common: tenants in common (like joint-tenants) are compellable by the statutes of Henry VIII. and William III., before-mentioned[d], to make partition of their lands; which they were not at common law. They properly take by distinct moieties, and have no entirety of interest; and therefore there is no survivorship between tenants in common. Their other incidents are such as merely arise from the unity of possession; and are therefore the same as appertain to joint-tenants merely upon that account: such as being liable to reciprocal actions of waste, and of account, by the statutes of Westm. 2. c. 22. and 4 Ann. c. 16. For by the common law no tenant in common was liable to account with his companion for embezzling the profits of the estate[e]; though, if one actually turns the other out of possession, an action of ejectment will lie against him[f]. But, as for other incidents of joint-tenants; which arise from the privity of title, or the

[z] Poph. 52.
[a] 1 Eq. Cas. Abr. 291.
[b] 1 P. Wms. 17.
[c] 3 Rep. 39, 1 Vent. 216. 227.
[d] pag. 185. & 189.
[e] Co. Litt. 199.
[f] *Ibid.* 200.

union and entirety of interest, (such as joining or being joined in actions [g], unless in the case where some entire or indivisible thing is to be recovered [h],) these are not applicable to tenants in common, whose interests are distinct, and whose titles are not joint but several. (10).

Estates in common can only be dissolved two ways; 1. By uniting all the titles and interests in one tenant, by purchase or otherwise; which brings the whole to one severalty: 2. By making partition between the several tenants in common, which gives them all respective severalties. For indeed tenancies in common differ in nothing from sole estates but merely in the blending and unity of possession. And this finishes our inquiries with respect to the nature of *estates*.

[g] Litt. § 311. [h] Co. Litt. 197.

(10) Whether tenants in common should sue jointly or severally, depends on the nature of the thing sued for, and the interest which they have in it; if it be for an indivisible thing, or for damages for an injury or nuisance to their common property, or for breaches of covenant on a lease made by them jointly, in these and all cases falling under the same principle, they should join; but where they seek to recover the estate itself, or sue for damages on covenants for the title annexed to it, in such cases they should sue severally. See Com. Dig. Abatement. E. 10.

CHAPTER THE THIRTEENTH.

OF THE TITLE TO THINGS REAL, IN GENERAL.

THE foregoing chapters having been principally employed in defining the *nature* of things real, in describing the *tenures* by which they may be holden, and in distinguishing the several kinds of *estate* or interest that may be had therein; I now come to consider, lastly, the *title* to things real, with the manner of acquiring and losing it.

A TITLE is thus defined by sir Edward Coke[a], *titulus est justa causa possidendi id quod nostrum est*; or, it is the means whereby the owner of lands hath the just possession of his property.

THERE are several stages or degrees requisite to form a complete title to lands and tenements. We will consider them in a progressive order.

I. THE lowest and most imperfect degree of title consists in the mere *naked possession*, or actual occupation of the estate; without any apparent right, or any shadow or pretence of right, to hold and continue such possession. This may happen, when one man invades the possession of another, and by force or surprise turns him out of the occupation of his lands; which is termed a *disseisin*, being a deprivation of that actual seisin, or corporal freehold of the lands, which the tenant before enjoyed. (1). Or it may happen, that after

[a] 1 Inst. 345.

(1) See Vol. III. p. 170, 171. for a more full and accurate account of disseisin.

the death of the ancestor and before the entry of the heir, or
[196] after the death of a particular tenant and before the entry of him in remainder or reversion, a stranger may contrive to get possession of the vacant land, and hold out him that had a right to enter. In all which cases, and many others that might be here suggested, the wrongdoer has only a mere naked possession, which the rightful owner may put an end to, by a variety of legal remedies, as will more fully appear in the third book of these commentaries. But in the mean time till some act be done by the rightful owner to devest this possession and assert his title, such actual possession is, *prima facie*, evidence of a legal title in the possessor; and it may by length of time, and negligence of him who hath the right, by degrees ripen into a perfect and indefeasible title. And, at all events, without such actual possession no title can be completely good.

II. The next step to a good and perfect title is the *right of possession*, which may reside in one man, while the actual possession is not in himself, but in another. For if a man be disseised, or otherwise kept out of possession, by any of the means before mentioned, through the *actual* possession be lost, yet he has still remaining in him the *right* of possession; and may exert it whenever he thinks proper, by entering upon the disseisor, and turning him out of that occupancy which he has so illegally gained. But this right of possession is of two sorts: an *apparent* right of possession, which may be defeated by proving a better; and an *actual* right of possession, which will stand the test against all opponents. Thus, if the disseisor, or other wrongdoer, dies possessed of the land whereof he so became seised by his own unlawful act, and the same descends to his heir; now by the common law the heir hath obtained an *apparent* right though the *actual* right of possession resides in the person disseised; and it shall not be lawful for the person disseised to devest this apparent right by mere entry or other act of his own, but only by an action at law[b]: for, until the contrary be proved by legal demonstration, the law will rather presume the right to
[197] reside in the heir, whose ancestor died seised, than in one who

[b] Litt. § 385.

has no such presumptive evidence to urge in his own behalf. Which doctrine in some measure arose from the principles of the feodal law, which, after feuds became hereditary, much favoured the right of descent; in order that there might be a person always upon the spot to perform the feodal duties and services [c]; and therefore when a feudatory died in battle, or otherwise, it presumed always that his children were entitled to the feud, till the right was otherwise determined by his fellow-soldiers and fellow-tenants, the peers of the feodal court. But if he, who has the actual right of possession, puts in his claim, and brings his action within a reasonable time, and can prove by what unlawful means the ancestor became seised, he will then by sentence of law recover that possession, to which he hath such actual right. Yet, if he omits to bring this his possessory action within a competent time, his adversary may imperceptibly gain an actual right of possession, in consequence of the other's negligence. And by this, and certain other means, the party kept out of possession may have nothing left in him, but what we are next to speak of; *viz.*

III. The mere *right of property*, the *jus proprietatis*, without either possession or even the right of possession. This is frequently spoken of in our books under the name of the *mere right*, *jus merum*; and the estate of the owner is in such cases said to be totally devested, and *put to a right* [d]. A person in this situation may have the true ultimate property of the lands in himself: but by the intervention of certain circumstances, either by his own negligence, the solemn act of his ancestor, or the determination of a court of justice, the presumptive evidence of that right is strongly in favour of his antagonist; who has thereby obtained the absolute right of possession. As, in the first place, if a person disseised, or turned out of possession of his estate, neglects to pursue his remedy within the time limited by law: by this means the disseisor or his heirs gain the actual right of possession: for the [198] law presumes that either he had a good right originally, in virtue of which he entered on the lands in question, or that since such his entry he has procured a sufficient title; and, therefore, after so long an acquiescence, the law will not suffer

[c] Gilb. Ten. 18. [d] Co. Litt. 345.

his possession to be disturbed without inquiring into the absolute right of property. Yet, still, if the person disseised or his heir hath the true right of property remaining in himself, his estate is indeed said to be turned into a mere right: but, by proving such his better right, he may at length recover the lands. Again, if a tenant in tail discontinues his estate-tail, by alienating the lands to a stranger in fee, and dies; here the issue in tail hath no right of *possession*, independent of the right of *property*: for the law presumes *prima facie* that the ancestor would not disinherit, or attempt to disinherit, his heir, unless he had power so to do; and therefore, as the ancestor had in himself the right of possession, and has transferred the same to a stranger, the law will not permit that possession now to be disturbed, unless by shewing the absolute right of property to reside in another person. (2) The heir therefore in this case has only a *mere right*, and must be strictly held to the proof of it, in order to recover the lands. Lastly, if by accident, neglect, or otherwise, judgment is given for either party in any *possessory* action, (that is, such wherein the right of possession only, and not that of property, is contested,) and the other party hath indeed in himself the right of property, this is now turned to a *mere right*; and upon proof thereof in a subsequent action, denominated a writ of right, he shall recover his seisin of the lands.

Thus, if a disseisor turns me out of possession of my lands, he hereby gains a *mere naked possession*, and I still retain the *right of possession*, and *right of property*. If the disseisor dies, and the lands descend to his son, the son gains an *apparent* right of *possession*; but I still retain the *actual* right both of *possession* and *property*. If I acquiesce for thirty years, without bringing any action to recover possession of the lands, the son gains the *actual right of possession*, and I retain no-
[199] thing but the *mere right of property*. And even this right of property will fail, or at least it will be without a remedy, unless I pursue it within the space of sixty years. So also if the father be tenant in tail, and alienes the estate-tail to a stranger in fee, the alienee thereby gains the *right of possession*,

(2) For discontinuance, see Vol. III. p. 171. n. 3.

and the son hath only the *mere right* or *right of property*. And hence it will follow, that one man may have the *possession*, another the *right of possession*, and a third the *right of property*. For if tenant in tail enfeoffs A in fee-simple, and dies, and B disseises A; now B will have the *possession*, A the *right of possession*, and the issue in tail the *right of property*. A may recover the possession against B; and afterwards the issue in tail may evict A, and unite in himself the possession, the right of possession, and also the right of property. In which union consists,

IV. A COMPLETE title to lands, tenements, and hereditaments. For it is an antient maxim of the law [e], that no title is completely good, unless the right of possession be joined with the right of property; which right is then denominated a double right, *jus duplicatum*, or *droit droit* [f]. And when to this double right the actual possession is also united, when there is, according to the expression of Fleta [g], *juris et seisinae conjunctio*, then, and then only, is the title completely legal. (3)

[e] Mirr. *l.* 2. *c.* 27.
[f] Co. Litt. 266. Bract. *l.* 5. *tr.* 3. *c.* 5. § 2.
[g] *l.* 3. *c.* 15. § 6.

(3) The mere student may be misled by the use of the term "actual possession" all through this chapter. The author means only possession of the freehold, which a man may have, either by his own personal occupation, or that of his lessee, for years, or at will.

CHAPTER THE FOURTEENTH.

OF TITLE BY DESCENT.

THE several gradations and stages, requisite to form a complete title to lands, tenements, and hereditaments, having been briefly stated in the preceding chapter, we are next to consider the several manners in which this complete title (and therein principally the right of *propriety*) may be reciprocally lost and acquired: whereby the dominion of things real is either continued, or transferred from one man to another. And here we must first of all observe, that (as gain and loss are terms of relation, and of a reciprocal nature) by whatever method one man gains an estate, by that same method or it's correlative some other man has lost it. As where the heir acquires by descent, the ancestor has first lost or abandoned his estate by his death: where the lord gains land by escheat, the estate of the tenant is first of all lost by the natural or legal extinction of all his hereditary blood: where a man gains an interest by occupancy, the former owner has previously relinquished his right of possession: where one man claims by prescription or immemorial usage, another man has either parted with his right by an antient and now forgotten grant, or has forfeited it by the supineness or neglect of himself and his ancestors for ages; and so in case of forfeiture, the tenant by his own misbehaviour or neglect has renounced his interest in the estate; whereupon it devolves to that person who by law may take advantage of such default: and, in alienation by common assurances, the two considerations of loss and acquisition are so interwoven, and so constantly contemplated together, that we never hear of a conveyance, without at once receiving the ideas as well of the grantor as the grantee.

[201]

THE methods, therefore, of acquiring on the one hand, and of losing on the other, a title to estates in things real, are reduced by our law to two: *descent*, where the title is vested in a man by the single operation of law; and *purchase*, where the title is vested in him by his own act or agreement[a]. (1)

DESCENT, or hereditary succession, is the title whereby a man on the death of his ancestor acquires his estate by right of representation, as his heir at law. An heir, therefore, is he upon whom the law casts the estate immediately on the death of the ancestor: and an estate, so descending to the heir, is in law called the inheritance.

THE doctrine of descents, or law of inheritances in fee-simple, is a point of the highest importance; and is indeed the principal object of the laws of real property in England. All the rules relating to purchases, whereby the legal course of descents is broken and altered, perpetually refer to this settled law of inheritance, as a *datum* or first principle universally known, and upon which their subsequent limitations are to work. Thus a gift in tail, or to a man and the heirs of his body, is a limitation that cannot be perfectly understood without a previous knowledge of the law of descents in fee-simple. One may well perceive that this is an estate confined in it's descent to such heirs only of the donee, as have sprung or shall spring from his body; but who those heirs are, whether all his children both male and female, or the male only, and (among the males) whether the eldest, youngest,

[a] Co. Litt. 18.

(1) This is strictly correct, though there is a mode of acquiring or succeeding to property, which at first sight seems to be neither descent or purchase. Thus, if lands are limited to the heirs male of the body of A, no estate being in, or given to A himself, the heir has an estate tail, and on failure of his issue male, it will go in succession to the other heirs male of the body of A. This is no descent, because the estate never attached in A the ancestor, nor was derived from or through him; and it does not look like a purchase, because it will not go to the persons who would have taken it, if such, from the purchaser, but goes as it would have done under a special descent from A *secundum formam doni*. But it is, in truth, a purchase with the qualities of a special descent. See Fearne, Con. Rem. p. 80. 7th Ed.

or other son alone, or all the sons together, shall be his heirs; that is a point that we must result back to the standing law of descents in fee-simple to be informed of.

[202] In order therefore to treat a matter of this universal consequence the more clearly, I shall endeavour to lay aside such matters as will only tend to breed embarrassment and confusion in our inquiries, and shall confine myself entirely to this one object. I shall therefore decline considering at present who are, and who are not, capable of being heirs; reserving that for the chapter of *escheats*. I shall also pass over the frequent division of descents into those by *custom*, *statute*, and *common law*: for descents by *particular custom*, as to all the sons in gavelkind, and to the youngest in borough-english, have already been often [b] hinted at, and may also be incidentally touched upon again; but will not make a separate consideration by themselves, in a system so general as the present: and descents by *statute*, or fees-tail *per formam doni*, in pursuance of the statute of Westminster the second, have also been already [c] copiously handled; and it has been seen that the descent in tail is restrained and regulated according to the words of the original donation, and does not entirely pursue the common law doctrine of inheritance; which, and which only, it will now be our business to explain.

And, as this depends not a little on the nature of kindred, and the several degrees of consanguinity, it will be previously necessary to state, as briefly as possible, the true notion of this kindred or alliance in blood [d].

Consanguinity, or kindred, is defined by the writers on these subjects to be "*vinculum personarum ab eodem stipite descendentium*;" the connexion or relation of persons descended from the same stock or common ancestor. This consanguinity is either lineal, or collateral.

[b] See vol. I. pag. 74, 75. Vol. II. pag. 83. 85.

[c] See pag. 112, &c.

[d] For a fuller explanation of the doctrine of consanguinity, and the consequences resulting from a right apprehension of it's nature, see *An essay on collateral consanguinity*. (Law tracts, *Oxon*, 1762. 8vo. or 1771, 4to.)

LINEAL consanguinity is that which subsists between persons, of whom one is descended in a direct line from the other, as between John Stiles (the *propositus* in the table of consanguinity) and his father, grandfather, great grandfather, and so upwards in the direct ascending line; or between John Stiles and his son, grandson, great-grandson, and so downwards in the direct descending line. Every generation, in this lineal direct consanguinity, constitutes a different degree, reckoning either upwards or downwards; the father of John Stiles is related to him in the first degree, and so likewise is his son; his grandsire and grandson in the second; his great-grandsire and great-grandson in the third. This is the only natural way of reckoning the degrees in the direct line, and, therefore, universally obtains, as well in the civil[e], and canon [f], as in the common law [g].

THE doctrine of lineal consanguinity is sufficiently plain and obvious; but it is at the first view astonishing to consider the number of lineal ancestors which every man has, within no very great number of degrees; and so many different bloods [h] is a man said to contain in his veins, as he hath lineal ancestors. Of these he hath two in the first ascending degree, his own parents; he hath four in the second, the parents of his father and the parents of his mother; he hath eight in the third, the parents of his two grandfathers and two grandmothers; and by the same rule of progression, he hath an hundred and twenty-eight in the seventh; a thousand and twenty-four in the tenth: and at the twentieth degree, or the distance of twenty generations, every man hath above a million of ancestors, as common arithmetic will demonstrate [i]. This lineal consanguinity, we may observe, falls strictly within the definition of *vinculum personarum ad eodem stipite descendentiam*; since lineal relations are such as descend one from the other, and both, of course, from the same common ancestor. [204]

[e] *Ff.* 38. 10. 10.
[f] *Decretal. l.* 4. *tit.* 14.
[g] Co. Litt. 23.
[h] *Ibid.* 12.
[i] This will seem surprising to those who are unacquainted with the increasing power of progressive numbers: but is palpably evident from the following table of a geometrical progression, in which the first term is 2, and the deno-

Collateral kindred answers to the same description; collateral relations agreeing with the lineal in this, that they descend from the same stock or ancestor; but differing in this, that they do not descend one from the other. Collateral kinsmen are such then as lineally spring from one and the same ancestor, who is the *stirps*, or root, the *stipes*, trunk, or common stock, from whence these relations are branched out. As if John Stiles hath two sons, who have each a
[205] numerous issue: both these issues are lineally descended from John Stiles as their common ancestor; and they are collateral kinsmen to each other, because they are all descended from this common ancestor, and all have a portion of his blood in their veins, which denominates them *consanguineos*.

minator also 2; or, to speak more intelligibly, it is evident, for that each of us has two ancestors in the first degree: the number of whom is doubled at every remove, because each of our ancestors has also two immediate ancestors of his own.

Lineal Degrees.	*Number of Ancestors.*
1	2
2	4
3	8
4	16
5	32
6	64
7	128
8	256
9	512
10	1024
11	2048
12	4096
13	8192
14	16384
15	32768
16	65536
17	131072
18	262144
19	524288
20	1048576

A shorter method of finding the number of ancestors at any even degree is by squaring the number of ancestors at half that number of degrees. Thus 16 (the number of ancestors at four degrees) is the square of 4, the number of ancestors at two; 256 is the square of 16; 65536 of 256; and the number of ancestors at 40 degrees would be the square of 1048576, or upwards of a million millions.

We must be careful to remember, that the very being of collateral consanguinity consists in this descent from one and the same common ancestor. Thus *Titius* and his brother are related; why? because both are derived from one father; *Titius* and his first cousin are related; why? because both descend from the same grandfather; and his second cousin's claim to consanguinity is this, that they both are derived from one and the same great grandfather. In short, as many ancestors as a man has, so many common stocks he has, from which collateral kinsmen may be derived. And as we are taught by holy writ, that there is one couple of ancestors belonging to us all, from whom the whole race of mankind is descended, the obvious and undeniable consequence is, that all men are in some degree related to each other. For, indeed, if we only suppose each couple of our ancestors to have left one with another, two children; and each of those children, on an average, to have left two more: (and, without such a supposition, the human species must be daily diminishing) we shall find that all of us have now subsisting near two hundred and seventy millions of kindred in the fifteenth degree, at the same distance from the several common ancestors as ourselves are; besides those that are one or two descents nearer to or farther from the common stock, who may amount to as many more [k]. And if this calculation should appear incompatible with the number of inhabitants on the earth, it is because, by intermarriages among the several descendants from the same ancestor, a hundred or a thousand modes of consanguinity may be consolidated in one person, or he may be related to us a hundred or a thousand different ways.

[k] This will swell more considerably than the former calculation; for here, though the first term is but 1, the denominator is 4; that is, there is *one* kinsman (a brother) in the first degree, who makes, together with the *propositus*, the two descendants from the first couple of ancestors; and in every other degree the number of kindred must be the *quadruple* of those in the degree which immediately precedes it. For, since each couple of ancestors has two descendants, who increase in a duplicate *ratio*, it will follow that the *ratio*, in which all the descendants increase downwards, must be double to that in which the ancestors increase upwards; but we have seen that the ancestors increase upwards in a

The method of computing these degrees in the canon law [l], which our law has adopted [m] is as follows: We begin at the common ancestor, and reckon downwards; and in whatsoever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree
[207] in which they are related to each other. Thus *Titius* and his brother are related in the first degree; for from the father to each of them is counted only one; *Titius* and his nephew are related in the second degree; for the nephew is two degrees removed from the common ancestor; *viz.* his own

duplicate *ratio:* therefore the descendants must increase downwards in a double duplicate, that is, in a quadruple *ratio.*

Collateral Degrees.	*Number of Kindred.*
1	1
2	4
3	16
4	64
5	256
6	1024
7	4096
8	16384
9	65536
10	262144
11	1048576
12	4194304
13	16777216
14	67108864
15	268435456
16	1073741824
17	4294967296
18	17179869184
19	68719476736
20	274877906944

This calculation may also be formed by a more compendious process, *viz.* by squaring the couples, or half the number of ancestors, at any given degree; which will furnish us with the number of kindred we have in the same degree, at equal distance with ourselves from the common stock, besides those at unequal distances. Thus, in the tenth lineal degree, the number of ancestors is 1024; it's half, or the couples, amount to 512; the number of kindred in the tenth collateral degree amounts therefore to 262144, or the square of 512. And if we will be at the trouble to recollect the state of the several families within our own knowledge, and observe how far they agree with this account; that is, whether on an average every man has not one brother or sister, four first cousins, sixteen second cousins, and so on; we shall find that the present calculation is very far from being overcharged.

[l] *Decretal.* 4. 14. 3 & 9.

[m] Co. Litt. 23.

grandfather, the father of *Titius*. Or, (to give a more illustrious instance from our English annals,) king Henry the seventh, who slew Richard the third in the battle of Bosworth, was related to that prince in the fifth degree. Let the *propositus*, therefore, in the table of consanguinity represent king Richard the third, and the class marked (e) king Henry the seventh. Now their common stock or ancestor was king Edward the third, the *abavus* in the same table: from him to Edmond duke of York, the *proavus*, is one degree; to Richard earl of Cambridge, the *avus*, two; to Richard duke of York, the *pater*, three; to king Richard the third, the *propositus*, four; and from king Edward the third to John of Gant (a) is one degree; to John earl of Somerset (b), two; to John duke of Somerset (c), three; to Margaret countess of Richmond (d,) four; to king Henry the seventh (e), five. Which last-mentioned prince, being the farthest removed from the common stock, gives the denomination to the degree of kindred in the canon and municipal law. Though, according to the computation of the civilians, (who count upwards from either of the persons related, to the common stock, and then downwards again to the other: reckoning a degree for each person both ascending and descending,) these two princes were related in the ninth degree, for from king Richard the third to Richard duke of York is one degree; to Richard earl of Cambridge, two; to Edmond duke of York, three; to king Edward the third, the common ancestor, four; to John of Gant, five; to John earl of Somerset, six; to John duke of Somerset, seven; to Margaret countess of Richmond, eight; to king Henry the seventh, nine [n].

[208] The nature and degrees of kindred being thus in some measure explained, I shall next proceed to lay down a series of rules or canons of inheritance, according to which, estates are transmitted from the ancestor to the heir; together with an explanatory comment, remarking their original and pro-

[n] See the table of consanguinity annexed; wherein all the degrees of collateral kindred to the *propositus* are computed so far as the tenth of the civilians and the seventh of the canonists inclusive; the former being distinguished by the numeral letters, the latter by the common cyphers.

gress, the reasons upon which they are founded, and in some cases their agreement with the laws of other nations.

I. The first rule is, that inheritances shall lineally descend to the issue of the person who last died actually seised *in infinitum*; but shall never lineally ascend.

To explain the more clearly both this and the subsequent rules, it must first be observed, that by law no inheritance can vest, nor can any person be the actual complete heir of another, till the ancestor is previously dead. *Nemo est haeres vivcntis.* Before that time the person who is next in the line of succession is called an heir apparent, or heir presumptive. Heirs apparent are such, whose right of inheritance is indefeasible, provided they outlive the ancestor; as the eldest son or his issue, who must by the course of the common law be heir to the father whenever he happens to die. Heirs presumptive are such who, if the ancestor should die immediately, would in the present circumstances of things be his heirs; but whose right of inheritance may be defeated by the contingency of some nearer heir being born: as a brother, or nephew, whose presumptive succession may be destroyed by the birth of a child; or a daughter, whose present hopes may be hereafter cut off by the birth of a son. Nay, even if the estate hath descended, by the death of such owner, to such brother, or nephew, or daughter, in the former cases, the estate shall be devested and taken away by the birth of a posthumous child; and, in the latter, it shall also be totally devested by the birth of a posthumous son [o]. (2)

[209] We must also remember, that no person can be properly such an ancestor, as that an inheritance of lands or tenements can be derived from him, unless he hath had actual seisin of such lands, either by his own entry, or by the possession of his own or his ancestor's lessee for years, or by receiving rent from a lessee of the freehold [p]: (3) or unless he hath had what

[o] Bro. *tit. descent*, 58. [p] Co. Litt. 15.

(2) See ante, p. 169. n. (4), as to the intermediate profits.

(3) It seems doubtful whether receiving rent reserved on a freehold lease, is

is equivalent to corporal seisin in hereditaments that are incorporeal; such as the receipt of rent, a presentation to the church in case of an advowson [q], and the like. But he shall not be accounted an ancestor, who hath had only a bare right or title to enter or be otherwise seised. And therefore all the cases which will be mentioned in the present chapter, are upon the supposition that the deceased (whose inheritance is now claimed) was the last person actually seised thereof. For the law requires this notoriety of possession, as evidence that the ancestor had that property in himself, which is now to be transmitted to his heir. Which notoriety had succeeded in the place of the antient feodal investiture, whereby, while feuds were precarious, the vasal on the descent of lands was formerly admitted in the lord's court (as is still the practice in Scotland,) and there received his seisin, in the nature of a renewal of his ancestor's grant, in the presence of the feodal peers; till at length, when the right of succession became indefeasible, an entry on any part of the lands within the county (which if disputed was afterwards to be tried by those peers), or other notorious possession, was admitted as equivalent to the formal grant of seisin, and made the tenant capable of transmitting his estate by descent. The seisin, therefore, of any person, thus understood, makes him the root or stock, from which all future inheritance by right of blood must be derived: which is very briefly expressed in this maxim, *seisina facit stipitem* [r].

[210]

When, therefore, a person dies so seised, the inheritance first goes to his issue: as if there be Geoffrey, John, and Matthew, grandfather, father, and son; and John purchases

[q] Co. Litt. 11.

[r] Flet. *l.* 6. *c.* 2. § 2.

is equivalent to corporal seisin of the lands; upon comparing the passage in Lord Coke cited as an authority, with Co. Litt. 32 a., & 3 Rep. 42 a., it would seem that his opinion was in the negative. The same point was ruled in cases cited from Hale's MSS., and Mr. J. Glyn's MS. Rep. by Mr. Hargrave, Co. Litt. 15 a. n. 83.; and in *Doe* v. *Keen*, 7 T.R. 390. Lord Kenyon certainly understands him so to have thought, and adopts it as a rule, that to give such seisin, rent must have been received *after the expiration* of the frechold lease. In *Doe* v. *Whichelo*, 8 T.R. 213, I understand him to lay down the same rule, though there is some little ambiguity of expression.

lands, and dies; his son Matthew shall succeed him as heir, and not the grandfather, Geoffrey; to whom the land shall never ascend, but shall rather escheat to the lord [s].

This rule, so far as it is affirmative and relates to lineal descents, is almost universally adopted by all nations; and it seems founded on a principle of natural reason, that (whenever a right of property transmissible to representatives is admitted) the possessions of the parents should go, upon their decease, in the first place to their children, as those to whom they have given being, and for whom they are, therefore, bound to provide. But the negative branch, or total exclusion of parents and all lineal ancestors from succeeding to the inheritance of their offspring, is peculiar to our own laws, and such as have been deduced from the same original. For, by the Jewish law, on failure of issue, the father succeeded to the son, in exclusion of brethren, unless one of them married the widow, and raised up seed to his brother [t]. And by the laws of Rome, in the first place, the children or lineal descendants were preferred; and on failure of these, the father and mother or lineal ascendants succeeded together with the brethren and sisters [v]; though by the law of the twelve tables, the mother was originally, on account of her sex, excluded [u]. Hence this rule of our laws has been censured and declaimed against as absurd, and derogating from the maxims of equity and natural justice [w]. Yet that there is nothing unjust or absurd in it, but that on the contrary it is founded upon very good legal reason, may appear from considering as well the nature of the rule itself as the occasion of introducing it into our laws.

[211] We are to reflect, in the first place, that all rules of succession to estates are creatures of the civil polity, and *juris positivi* merely. The right of property, which is gained by occupancy, extends naturally no farther than the life of the present possessor: after which the land by the law of nature would again become common, and liable to be seised by the next occupant: but society, to prevent the mischiefs that

[s] Litt. § 3.
[t] Seld. *de success. Ebraeor.* c. 12.
[v] *Ff.* 38. 15. 1. *Nov.* 118. 127.
[u] *Inst.* 3. 3. 1.
[w] Craig. *de jur. feud. l.* 2. *t.* 13. § 15. Locke on Gov. part 1. § 90.

might ensue from a doctrine so productive of contention, has established conveyances, wills, and successions; whereby the property originally gained by succession is continued and transmitted from one man to another, according to the rules which each state has respectively thought proper to prescribe. There is certainly, therefore, no injustice done to individuals, whatever be the path of descent marked out by the municipal law.

If we next consider the time and occasion of introducing this rule into our law, we shall find it to have been grounded upon very substantial reasons. I think there is no doubt to be made, but that it was introduced at the same time with, and in consequence of, the feodal tenures. For it was an express rule of the feodal law [x], that *successionis feudi talis est natura, quod ascendentes non succedunt;* and [therefore the same maxim obtains also in the French law to this day [y]. (4) Our Henry the first, indeed, among other restorations of the old Saxon laws, restored the right of succession in the ascending line [z]: but this soon fell again into disuse; for so early as Glanvil's time, who wrote under Henry the second, we find it laid down as established law [a], that *haereditas nunquam ascendit;* which has remained an invariable maxim ever since. These circumstances evidently shew this rule to be of feodal original; and taken in that light, there are some arguments in its favour, besides those which are drawn merely [212] from the reason of the thing. For if the feud of which the son died seised was really *feudum antiquum*, or one descended to him from his ancestors, the father could not possibly succeed to it, because it must have passed him in the course of descent, before it could come to the son; unless it were

[x] 2 *Feud.* 50.
[y] Domat, *p.* 2. *l.* 2. *t.* 2. Montesq. *Esp. L. l.* 31. *c.* 34.
[z] *LL. Hen. I. c.* 70.
[a] *l.* 7. *c.* 1.

(4) This is now altered, and where a party dies leaving no lineal descendants, nor brothers, or sisters, or lineal descendants from them, the inheritance is equally divided between the two ascending lines; the nearest in degree in each takes one half, and if there are more than one in the same degree, the moiety of that line is divided *per capita*. Code Civil, L. 3. Tit. 1. 746.

feudum maternum, or one descended from his mother, and then for other reasons (which will appear hereafter) the father could in no wise inherit it. And if it were *feudum novum*, or one newly acquired by the son, then only the descendants from the body of the feudatory himself could succeed, by the known maxim of the early feodal constitutions [b]; which was founded as well upon the personal merit of the vasal, which might be transmitted to his children, but could not ascend to his progenitors, as also upon this consideration of military policy, that the decrepit grandsire of a vigorous vasal would be but indifferently qualified to succeed him in his feodal services. Nay, even if this *feudum novum* were held by the son *ut feudum antiquum*, or with all the qualities annexed to a feud descended from the ancestors, such feud must in all respects have descended as if it had been really an antient feud; and therefore could not go to the father, because, if it had been an antient feud, the father must have been dead before it could have come to the son. Thus, whether the feud was strictly *novum*, or strictly *antiquum*, or whether it was *novum* held *ut antiquum*, in none of these cases the father could possibly succeed. These reasons, drawn from the history of the rule itself, seem to be more satisfactory than that quaint one of Bracton [c], adopted by sir Edward Coke [d], which regulates the descent of lands according to the laws of gravitation.

II. A second general rule or canon is, that the male issue shall be admitted before the female.

[b] 1 *Feud.* 20

[c] *Descendit itaque jus, quasi ponderosum quid cadens deorsum recta linea, et nunquam reascendit. l.* 2. *c.* 29. (5)

[d] 1 Inst. 11.

(5) The passage in Bracton, is thus continued and qualified, "*ea viâ quâ descendit.*" And this is a necessary qualification, because the uncle may inherit to the son, and the father to the uncle, so that *indirectly* the inheritance does ascend. Though this, and other exceptions, cannot be accounted for on the principles laid down in the text, yet I conceive the author's reasoning to be just, and that it will often be found in the old English law, that where there is a good foundation for a rule in general, the rule is extended to cases in which that foundation will not strictly bear it out, rather than introduce a multiplicity of conflicting rules. The total exclusion of the half-blood from inheriting, even where there must be, in fact, a greater chance of descent from the first purchaser, than in the whole blood, is an instance in point. See post, p. 231.

THUS sons shall be admitted before daughters; or, as our male lawgivers have somewhat uncomplaisantly expressed it, the worthiest of blood shall be preferred [e]. As if John Stiles hath two sons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and dies; first Matthew, and (in case of his death without issue) then Gilbert shall be admitted to the succession in preference to both the daughters.

THIS preference of males to females is entirely agreeable to the law of succession among the Jews [f], and also among the states of Greece, or at least among the Athenians [g]: but was totally unknown to the laws of Rome [h] (such of them I mean as are at present extant,) wherein brethren and sisters were allowed to succeed to equal portions of the inheritance. I shall not here enter into the comparative merit of the Roman and the other constitutions in this particular, nor examine into the greater dignity of blood in the male or female sex: but shall only observe, that our present preference of males to females seems to have arisen entirely from the feodal law. For though our British ancestors, the Welsh, appear to have given a preference to males [i], yet our Danish predecessors (who succeeded them) seem to have made no distinction of sexes, but to have admitted all the children at once to the inheritance [k]. But the feodal law of the Saxons on the continent (which was probably brought over hither, and first altered by the laws of king Canute) gives an evident preference of the male to the female sex. "*Pater aut mater* "*defuncti, filio non filiae haereditatem relinquent.* . . . . . "*Qui defunctus non filios sed filias reliquerit, ad eas omnis* "*haereditas pertineat* [l]." It is possible, therefore, that this preference might be a branch of that imperfect system of feuds, which obtained here beforethe conquest; especially as it subsists among the customs of gavelkind, and as, in the charter or laws of king Henry the first, it is not (like many [214] Norman innovations) given up, but rather enforced [m]. The true reason of preferring the males must be deduced from feodal principles: for, by the genuine and original policy of

[e] Hal. H. C. L. 235.
[f] Numb. c. 27.
[g] Petit. *LL. Attic. l.* 6. *t.* 6.
[h] *Inst.* 3. 1. 6.
[i] *Stat. Wall.* 12 Edw. I.
[k] *LL. Canut.* c. 68.
[l] *tit.* 7. § 1 & 4.
[m] *c.* 70.

that constitution, no female could ever succeed to a proper feud [n], inasmuch as they were incapable of performing those military services, for the sake of which that system was established. But our law does not extend to a total exclusion of females, as the Salic law, and others, where feuds were most strictly retained; it only postpones them to males; for though daughters are excluded by sons, yet they succeed before any collateral relations; our law, like that of the Saxon feudists before-mentioned, thus steering a middle course, between the absolute rejection of females, and the putting them on a footing with males.

III. A THIRD rule or canon of descent is this: that where there are two or more males, in equal degreee, the eldest only shall inherit; but the females all together.

As if a man hath two sons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and dies; Matthew his eldest son shall alone succeed to his estate, in exclusion of Gilbert the second son and both the daughters; but, if both the sons die without issue before the father, the daughters Margaret and Charlotte shall both inherit the estate as coparceners [o].

THIS right of primogeniture in males seems antiently to have only obtained among the Jews, in whose constitution the eldest son had a double portion of the inheritance [p]; in the same manner as with us, by the laws of king Henry the
[215] first [q], the eldest son had the capital fee or principal feud of his father's possessions, and no other pre-eminence; and as the eldest daughter had afterwards the principal mansion, when the estate descended in coparcenary [r]. The Greeks, the Romans, the Britons, the Saxons, and even originally the feudists, divided the lands equally; some among all the children at large, some among the males only. This is certainly the most obvious and natural way; and has the appearance, at least in the opinion of younger brothers, of the greatest impartiality and justice. But when the emperors began to create honorary feuds, or titles of nobility, it was found neces-

[n] 1 *Feud.* 8.
[o] Litt. § 5. Hale, H. C. L. 238.
[p] Selden, *de succ. Ebr. c.* 5.
[q] *c.* 70.
[r] Glanvil. *l.* 7. *c.* 3.

sary (in order to preserve their dignity) to make them impartible[s], or (as they styled them) *feuda individua*, and in consequence descendible to the eldest son alone. This example was farther enforced by the inconveniences that attended the splitting of estates; namely, the division of the military services, the multitude of infant tenants incapable of performing any duty, the consequential weakening of the strength of the kingdom, and the inducing younger sons to take up with the business and idleness of a country life, instead of being serviceable to themselves and the public, by engaging in mercantile, in military, in civil, or in ecclesiastical employments[t]. These reasons occasioned an almost total change in the method of feodal inheritances abroad; so that the eldest male began universally to succeed to the whole of the lands in all military tenures: and in this condition the feodal constitution was established in England by William the conqueror.

YET we find that socage estates frequently descended to all the sons equally, so lately as when Glanvill[u] wrote, in the reign of Henry the second; and it is mentioned in the mirror[w] as a part of our antient constitution, that knights' fees should descend to the eldest son, and socage fees should be partible among the male children. However, in Henry the third's time, we find by Bracton[x] that socage lands, in imitation of lands in chivalry, had almost entirely fallen into the right of succession by primogeniture, as the law now [216] stands: except in Kent, where they gloried in the preservation of their antient gavelkind tenure, of which a principal branch was a joint inheritance of all the sons[y]; and except in some particular manors and townships, where their local customs continued the descent, sometimes to all, sometimes to the youngest son only, or in other more singular methods of succession.

As to the females, they are still left as they were by the antient law: for they were all equally incapable of performing any personal service; and, therefore, one main reason of pre-

[s] 2 *Feud.* 55.
[t] Hale, H. C. L. 221.
[u] *l.* 7. *c.* 3.
[w] c. 1. § 3.
[x] *l.* 2. *c.* 30, 31. 34.
[y] Somner. Gavelk. 7.

ferring the eldest ceasing, such preference would have been injurious to the rest: and the other principal purpose, the prevention of the too minute subdivision of estates, was left to be considered and provided for by the lords, who had the disposal of these female heiresses in marriage. However, the succession by primogeniture, even among females, took place as to the inheritance of the crown[z]; wherein the necessity of a sole and determinate succession is as great in the one sex as the other. And the right of succession, though not of primogeniture, was also established with respect to female dignities and titles of honour. For if a man holds an earldom to him and the heirs of his body, and dies, leaving only daughters; the eldest shall not of course be countess, but the dignity is in suspense or abeyance till the king shall declare his pleasure; for he, being the fountain of honour, may confer it on which of them he pleases[a]. In which disposition is preserved a strong trace of the antient law of feuds, before their descent by primogeniture even among the males was established; namely, that the lord might bestow them on which of the sons he thought proper — "*progressum est ut ad "filios deveniret, in quem scilicet dominus hoc vellet beneficium "confirmare*[b]."

IV. A FOURTH rule, or canon of descents, is this; that the lineal descendants, *in infinitum*, of any person deceased, shall represent their ancestor; that is, shall stand in the same place as the person himself would have done, had he been living.

THUS the child, grandchild, or great grandchild (either male or female) of the eldest son succeeds before the younger son, and so *in infinitum*[c]. And these representatives shall take neither more nor less, but just so much as their principals would have done. As if there be two sisters, Margaret and Charlotte; and Margaret dies, leaving six daughters; and then John Stiles, the father of the two sisters, dies without other issue: these six daughters shall take among them exactly the same as their mother Margaret would have done,

[z] Co. Litt. 165.
[a] *Ibid.*
[b] 1 *Feud.* 1
[c] Hale. H. C. L. 236, 237.

had she been living; that is, a moiety of the lands of John Stiles in coparcenary: so that, upon partition made, if the land be divided into twelve parts, thereof Charlotte, the surviving sister, shall have six, and her six nieces, the daughters of Margaret, one apiece.

THIS taking by representation is called succession *in stirpes*, according to the roots; since all the branches inherit the same share that their root, whom they represent, would have done. And in this manner also was the Jewish succession directed[d]; but the Roman somewhat differed from it. In the descending line the right of representation continued *in infinitum*, and the inheritance still descended *in stirpes*: as if one of three daughters died, leaving ten children, and then the father died; the two surviving daughters had each one third of his effects, and the ten grandchildren had the remaining third divided between them. And so among collaterals, if any person of equal degree with the persons represented were still subsisting, (as if the deceased left one brother, and two nephews the sons of another brother,) the succession was still guided by the *roots*: but, if both of the brethren were dead leaving issue, then (I apprehend,) their representatives in equal degree became themselves principals, and shared the inheritance *per capita*, that is, share and share alike; they being themselves now the next in degree to the ancestor, in their own right, and not by right of representation[e]. So, if the next heirs of *Titius* be six nieces, three by one sister, two by another, and one by a third; his inheritance by the Roman law was divided into six parts, and one given to each of the nieces: whereas the law of England in this case would still divide it only into three parts, and distribute it *per stirpes*, thus; one third to the three children who represent one sister, another third to the two who represent the second, and the remaining third to the one child who is the sole representative of her mother. [218]

THIS mode of representation is a necessary consequence of the double preference given by our law, first to the male issue, and next to the first-born among the males, to both which the Roman law is a stranger. For if all the children of three

[d] Selden, *de succ. Ebr.* c. 1. [e] *Nov.* 118. c. 3. *Inst.* 3. 1. 6.

sisters were in England to claim *per capita*, in their own right as next of kin to the ancestor, without any respect to the stocks from whence they sprung, and those children were partly male and partly female; then the eldest male among them would exclude not only his own brethren and sisters, but all the issue of the other two daughters; or else the law in this instance must be inconsistent with itself, and depart from the preference which it constantly gives to the males and the first-born, among persons in equal degree. Whereas, by dividing the inheritance according to the roots, or *stirpes* the rule of descent is kept uniform and steady: the issue of the eldest son excludes all other pretenders, as the son himself (if living) would have done; but the issue of two daughters divide the inheritance between them, provided their mothers (if living) would have done the same: and among these several issues, or representatives of the respective roots, the same preference to males and the same right of primogeniture obtain as would have obtained at the first among the roots themselves, the sons or daughters of the deceased. As if a man hath two sons, A and B, and A dies leaving two
[219] sons, and then the grandfather dies; now the eldest son of A shall succeed to the whole of his grandfather's estates: and if A had left only two daughters, they should have succeeded also to equal moieties of the whole, in exclusion of B and his issue. But if a man hath only three daughters, C, D, and E; and C dies leaving two sons, D leaving two daughters, and E leaving a daughter and a son who is younger than his sister: here, when the grandfather dies, the eldest son of C shall succeed to one third, in exclusion of the younger; the two daughters of D to another third in partnership; and the son of E to the remaining third, in exclusion of his elder sister. And the same right of representation, guided and restrained by the same rules of descent, prevails downwards *in infinitum*.

Yet this right does not appear to have been thoroughly established in the time of Henry the second, when Glanvill wrote: and therefore, in the title to the crown especially, we find frequent contests between the younger (but surviving) brother and his nephew (being the son and representative of the elder deceased) in regard to the inheritance of

their common ancestor: for the uncle is certainly nearer of kin to the common stock, by one degree, than the nephew; though the nephew, by representing his father, has in him the right of primogeniture. The uncle also was usually better able to perform the services of the fief; and besides had frequently superior interest and strength to back his pretensions, and crush the right of his nephew. And even to this day, in the lower Saxony, proximity of blood takes place of representative primogeniture; that is, the younger surviving brother is admitted to the inheritance before the son of an elder deceased: which occasioned the disputes between the two houses of Mecklenburg Schwerin and Strelitz, in 1692[f]. Yet Glanvil, with us, even in the twelfth century, seems[g] to declare for the right of the nephew by representation; provided the eldest son had not received a provision in lands from his father, or (as the civil law would call it) had not been foris-familiated, in his life- [220] time. King John, however, who kept his nephew Arthur from the throne, by disputing this right of representation, did all in his power to abolish it throughout the realm[h]: but in the time of his son, king Henry the third, we find the rule indisputably settled in the manner we have here laid it down[i], and so it has continued ever since. And thus much for lineal descents.

V. A FIFTH rule is, that on failure of lineal descendants, or issue, of the person last seised, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser; subject to the three preceding rules.

THUS if Geoffrey Stiles purchases land, and it descends to John Stiles his son, and John dies seised thereof without issue; whoever succeeds to this inheritance must be of the blood of Geoffrey, the first purchaser of this family[k]. The first purchaser, *perquisitor*, is he who first acquired the estate to his family, whether the same was transferred to him by sale or by gift, or by any other method, except only that of descent.

[f] Mod. Un. Hist. xlii. 334.
[g] *l.* 7. *c.* 3.
[h] Hale, H. C. L. 217. 229.
[i] Bracton, *l.* 2. *c.* 30. § 2.
[k] Co. Litt. 12.

This is a rule almost peculiar to our own laws, and those of a similar original. For it was entirely unknown among the Jews, Greeks, and Romans; none of whose laws looked any farther than the person himself who died seised of the estate; but assigned him an heir, without considering by what title he gained it, or from what ancestor he derived it. But the law of Normandy [1] agrees with our law in this respect; nor indeed is that agreement to be wondered at, since the law of descents in both is of feodal original; and this rule or canon cannot otherwise be accounted for than by recurring to feodal principles.

When feuds first began to be hereditary, it was made a necessary qualification of the heir, who would succeed to a feud, that he should be of the blood of, that is, lineally de-
[221] scended from, the first feudatory or purchasor. In consequence whereof, if a vasal died seised of a feud of his own acquiring, or *feudum novum*, it could not descend to any but his own offspring; no, not even to his brother; because he was not descended, nor derived his blood, from the first acquirer. But if it was *feudum antiquum*, that is, one descended to the vasal from his ancestors, then his brother, or such other collateral relation as was descended and derived his blood from the first feudatory, might succeed to such inheritance. To this purpose speaks the following rule; "*frater* "*fi atri, sine legitimo haerede defuncto, in beneficio, quod eorum* "*patris fuit, succedat: sin autem unus e fratribus a domino feu-*" *dum acceperit, eo defuncto sine legitimo haerede, frater ejus in* "*feudum non succedit* [m]." The true feodal reason for which rule was this; that what was given to a man, for his personal service and personal merit, ought not to descend to any but the heirs of his person. And therefore, as in estates-tail, (which a proper feud very much resembled,) so in the feodal donation, "*nomen haeredis, in prima investitura expressum,* "*tantum ad descendentes ex corpore primi vasalli extenditur;* "*et non ad collaterales, nisi ex corpore primi vasalli sive stipitis* "*descendant* [n];" the will of the donor, or original lord, (when feuds were turned from life-estates into inheritances,)

[1] *Gr. Coustum. c.* 25.
[m] 1 *Feud.* 1. § 2.
[n] Craig. *l.* 1. *t.* 9. § 36.

not being to make them absolutely hereditary, like the Roman *allodium*, but hereditary only *sub modo*: not hereditary to the collateral relations, or lineal ancestors, or husband, or wife of the feudatory, but to the issue descended from his body only.

HOWEVER, in process of time, when the feodal rigour was in part abated, a method was invented to let in the collateral relations of the grantee to the inheritance, by by granting him a *feudum novum* to hold *ut feudum antiquum*; that is, with all the qualities annexed of a feud derived from his ancestors, and then the collateral relations were admitted to succeed even *in infinitum*, because they might have been of the blood of, that is, descended from, the first imaginary purchasor. For since it is not ascertained in such [222] general grants, whether this feud shall be held *ut feudum paternum* or *feudum avitum*, but *ut feudum antiquum* merely; as a feud of indefinite antiquity: that is, since it is not ascertained from which of the ancestors of the grantee this feud shall be supposed to have descended; the law will not ascertain it, but will suppose *any* of his ancestors, *pro re nata*, to have been the first purchasor: and therefore it admits *any* of his collateral kindred (who have the other necessary requisites) to the inheritance, because every collateral kinsman must be descended from some one of his lineal ancestors.

OF this nature are all the grants of fee-simple estates of this kingdom; for there is now in the law of England no such thing as a grant of a *feudum novum*, to be held *ut novum*: unless in a case of a fee-tail, and there we see that this rule is strictly observed, and none but the lineal descendants of the first donee (or purchasor) are admitted; but every grant of lands in fee-simple is with us a *feudum novum* to be held *ut antiquum*, as a feud whose antiquity is indefinite; and therefore the collateral kindred of the grantee, or descendants from any of his lineal ancestors, by whom the lands might have possibly been purchased, are capable of being called to the inheritance.

YET when an estate hath really descended in a course of inheritance to the person last seised, the strict rule of the

feodal law is still observed; and none are admitted but the heirs of those through whom the inheritance hath passed: for all others have demonstrably none of the blood of the first purchasor in them, and therefore shall never succeed. As, if lands come to John Stiles by descent from his mother Lucy Baker, no relation of his father (as such) shall ever be his heir of these lands; and *vice versa*, if they descended from his father Geoffrey Stiles, no relation of his mother (as such) shall ever be admitted thereto, for his father's kindred have none of his mother's blood, nor have his mother's relations any share of his father's blood. And so if the estate descended from his father's father, George Stiles; the relations of his father's mother, Cecilia Kempe, shall for the same reason never be admitted, but only those of
[223] his father's father. This is also the rule of the French law°, which is derived from the same feodal fountain (6).

Here we may observe, that so far as the feud is really *antiquum*, the law traces it back, and will not suffer any to inherit but the blood of those ancestors, from whom the feud was conveyed to the late proprietor. But when, through length of time, it can trace it no farther; as if it be not known whether his grandfather, George Stiles, inherited it from his father Walter Stiles, or his mother Christian Smith, or if it appear that his grandfather was the first grantee, and so took it (by the general law) as a feud of indefinite antiquity; in either of these cases the law admits the descendants of any ancestor of George Stiles, either paternal or maternal, to be in their due order the heirs to John Stiles of this estate; because in the first case it is really uncertain, and in the second case it is supposed to be uncertain, whether the grandfather derived his title from the part of his father or his mother.

This then is the great and general principle, upon which the law of collateral inheritances depends; that upon failure

° Domat. *part* 2. *pr.*

(6) This is now altered, *La loi ne considere ni la nature, ni l'origine des biens pour en regler la succession.* Code Civil, L. 3. T. 1. s. 732.

of issue in the last proprietor, the estate shall descend to the blood of the first purchasor; or that it shall result back to the heirs of the body of that ancestor, from whom it either really has, or is supposed by fiction of law to have originally descended; according to the rule laid down in the year books [p], Fitzherbert [q], Brook [r], and Hale [s], "that he who "would have been heir to the father of the deceased" (and, of course, to the mother, or any other real or supposed purchasing ancestor) "shall also be heir to the son;" a maxim, that will hold universally, except in the case of a brother or sister of the half-blood, which exception (as we shall see hereafter) depends upon very special grounds.

THE rules of inheritance that remain are only rules of evidence, calculated to investigate who the purchasing ancestor was; which *in feudis vere antiquis* has in process of time been forgotten, and is supposed so to be in feuds that are held *ut antiquis.* [224]

VI. A SIXTH rule or canon therefore is, that the collateral heir of the person last seised must be his next collateral kinsman, of the whole blood.

FIRST, he must be his next collateral kinsman, either personally or *jure representationis*; which proximity is reckoned according to the canonical degrees of consanguinity before mentioned. Therefore, the brother being in the first degree, he and his descendants shall exclude the uncle and his issue, who is only in the second. And herein consists the true reason of the different methods of computing the degrees of consanguinity, in the civil law on the one hand, and in the canon and common laws on the other. The civil law regards consanguinity, principally with respect to successions, and therein very naturally considers only the person deceased, to whom the relation is claimed: it therefore counts the degrees of kindred according to the number of persons through whom the claim must be derived from him; and makes not only his great-nephew but also his

[p] *M.* 12 *Edw. IV.* 14.
[q] *Abr. t. discent.* 2.
[r] *Abr. t. discent.* 38.
[s] H. C. L. 243.

first-cousin to be both related to him in the fourth degree; because there are three persons between him and each of them. The canon law regards consanguinity principally with a view to prevent incestuous marriages, between those who have a large portion of the same blood running in their respective veins; and therefore looks up to the author of that blood, or the common ancestor, reckoning the degrees from him: so that the great-nephew is related in the third canonical degree to the person proposed, and the first-cousin in the second: the former being distant three degrees from the common ancestor (the father of the *propositus*), and therefore deriving only one-fourth of his blood from the same fountain; the latter, and also the *propositus* himself, being each of them distant only two degrees from the common ancestor (the grandfather of each), and therefore having one half of each of their bloods the same. The common law regards consanguinity principally with respect to descents; and having therein the same object in view as the civil, it may seem as if it ought to proceed according to the civil computation.
[225] But as it also respects the purchasing ancestor, from whom the estate was derived, it therein resembles the canon law, and therefore counts it's degrees in the same manner. Indeed the designation of person, in seeking for the next of kin, will come to exactly the same end (though the degrees will be differently numbered), whichever method of computation we suppose the law of England to use; since the right of representation, of the parent by the issue, is allowed to prevail *in infinitum*. This allowance was absolutely necessary, else there would have frequently been many claimants in exactly the same degree of kindred, as (for instance) uncles and nephews of the deceased; which multiplicity, though no material inconvenience in the Roman law of partible inheritances, yet would have been productive of endless confusion where the right of sole succession, as with us, is established. The issue or descendants therefore of John Stiles's brother are all of them in the first degree of kindred with respect to inheritances, those of his uncle in the second, and those of his great-uncle in the third; as their respective ancestors, if living, would have been; and are severally called to the succession in right of such their representative proximity.

THE right of representation being thus established, the former part of the present rule amounts to this; that, on failure of issue of the person last seised, the inheritance shall descend to the other subsisting issue of his next immediate ancestor. Thus, if John Stiles dies without issue, his estate shall descend to Francis his brother, or his representatives; he being lineally descended from Geoffrey Stiles, John's next immediate ancestor, or father. On failure of brethren, or sisters, and their issue, it shall descend to the uncle of John Stiles, the lineal descendant of his grandfather George, and so on *in infinitum*. Very similar to which was the law of inheritance among the antient Germans, our progenitors: "*haeredes successoresque, sui cuique liberi, et nullum testamentum: si liberi non sunt, proximus gradus in possessione, fratres, patrui, avunculi*[t]."

Now here it must be observed, that the lineal ancestors, [226] though (according to the first rule) incapable themselves of succeeding to the estate, because it is supposed to have already passed them, are yet the common stocks from which the next successor must spring. And therefore in the Jewish law, which in this respect entirely corresponds with ours[u], the father or other lineal ancestor is himself said to be the heir, though long since dead, as being represented by the persons of his issue; who are held to succeed, not in their own rights, as brethren, uncles, *&c.*, but in right of representation, as the offspring of the father, grandfather, *&c.* of the deceased[w]. But, though the common ancestor be thus the root of the inheritance, yet with us it is not necessary to *name* him in making out the pedigree or descent. For the descent between two brothers is held to be an *immediate* descent; and therefore title may be made by one brother or his representatives *to* or *through* another, without mentioning their common father[x]. If Geoffrey Stiles hath two sons, John and Francis, Francis may claim as heir to John, without naming their father Geoffrey; and so the son of Francis may claim as cousin and heir to Matthew the son of John, without naming the grandfather; *viz.* as son of Francis, who

[t] Tacitus *de mor. Germ.* 20.
[u] Numb. c 27.
[w] Selden, *de succ. Ebr.* c. 12.
[x] 1 Sid. 196. 1 Vent. 423. 1 Lev. 60. 12 Mod. 619.

was the brother of John, who was the father of Matthew. But though the common ancestors are not named in deducing the pedigree, yet the law still respects them as the fountains of inheritable blood; and therefore, in order to ascertain the collateral heir of John Stiles, it is first necessary to recur to his ancestors in the first degree; and if they have left any other issue besides John, that issue will be his heir. On default of such, we must ascend one step higher, to the ancestors in the second degree, and then to those in the third and fourth, and so upwards *in infinitum*, till some couple of ancestors be found, who have other issue descending from them beside the deceased, in a parallel or collateral line. From these ancestors the heir of John Stiles must derive his descent; and in such derivation the same rules must be ob-
[227] served, with regard to sex, primogeniture, and representation, that have before been laid down with regard to lineal descents from the person of the last proprietor.

But, secondly, the heir need not be the nearest kinsman absolutely, but only *sub modo*; that is, he must be the nearest kinsman of the *whole* blood; for if there be a much nearer kinsman of the *half* blood, a distant kinsman of the whole blood shall be admitted, and the other entirely excluded; nay, the estate shall escheat to the lord, sooner than the half blood shall inherit.

A kinsman of the whole blood is he that is derived, not only from the same ancestor, but from the same couple of ancestors. For, as every man's own blood is compounded of the bloods of his respective ancestors, he only is properly of the whole or entire blood with another, who hath (so far as the distance of degrees will permit) all the same ingredients in the composition of his blood that the other had. Thus the blood of John Stiles being composed of those of Geoffrey Stiles his father, and Lucy Baker his mother, therefore his brother Francis, being descended from both the same parents, hath entirely the same blood with John Stiles; or he is his brother of the whole blood. But if, after the death of Geoffrey, Lucy Baker the mother marries a second husband, Lewis Gay, and hath issue by him; the blood of this issue, being compounded of the blood of Lucy Baker

(it is true) on the one part, but that of Lewis Gay (instead of Geoffrey Stiles), on the other part, it hath therefore only half the same ingredients with that of John Stiles; so that he is only his brother of the half blood, and for that reason they shall never inherit to each other. So also, if the father has two sons, A and B, by different venters or wives; now these two brethren are not brethren of the whole blood, and therefore shall never inherit to each other, but the estate shall rather escheat to the lord. Nay, even if the father dies, and his lands descend to his eldest son A, who enters thereon, and dies seised without issue; still B shall not be heir to this estate, because he is only of the half blood to A, the person last seised: but it shall descend to a sister (if any) of the whole blood to A: for in such cases the maxim is, that the seisin or *possessio fratris facit sororem esse haeredem.* Yet, [228] had A died without entry, then B might have inherited: not as heir to A his half-brother, but as heir to their common father, who was the person last actually seised [y].

This total exclusion of the half blood from the inheritance, being almost peculiar to our own law is looked upon as a strange hardship by such as are unacquainted with the reasons on which it is grounded. But these censures arise from a misapprehension of the rule, which is not so much to be considered in the light of a rule of descent, as of a rule of evidence: an auxiliary rule, to carry a former into execution. And here we must again remember, that the great and most universal principle of collateral inheritances being this, that the heir to a *feudum antiquum* must be of the blood of the first feudatory or purchasor, that is, derived in a lineal descent from him; it was originally requisite, as upon gifts in tail it still is, to make out the pedigree of the heir from the first donee or purchasor, and to shew that such heir was his lineal representative. But when, by length of time and a long course of descents, it came (in those rude and unlettered ages) to be forgotten who was really the first feudatory or purchasor, and thereby the proof of an actual descent from him became impossible; then the law substituted what sir Martin Wright [z] calls a *reasonable*, in the stead of an *impos-*

[y] Hale, H. C. L. 238. [z] Tenures, 185.

sible, proof; for it remits the proof of an actual descent from the first purchasor; and only requires in lieu of it, that the claimant be next of the whole blood to the person last in possession, (or derived from the same couple of ancestors); which will probably answer the same end as if he could trace his pedigree in a direct line from the first purchasor. For he who is my kinsman of the whole blood, can have no ancestors beyond or higher than the common stock, but what are equally my ancestors also; and mine are *vice versa* his: he therefore is very likely to be derived from that unknown ancestor of mine, from whom the inheritance descended. But a kinsman of the half blood has but one half of his ancestors above the common stock the same as mine; and therefore there is not the same probability of that standing requisite in the law, that he be derived from the blood of the first purchasor.

[229] To illustrate this by example. Let there be John Stiles, and Francis, brothers, by the same father and mother, and another son of the same mother by Lewis Gay, a second husband. Now, if John dies seised of lands, but it is uncertain whether they descended to him from his father or mother; in this case his brother Francis, of the whole blood, is qualified to be his heir: for he is sure to be in the line of descent from the first purchasor, whether it were the line of the father or the mother. But if Francis should die before John, without issue, the mother's son by Lewis Gay (or brother of the half blood) is utterly incapable of being heir; for he cannot prove his descent from the first purchasor, who is unknown, nor has he that fair probability which the law admits as presumptive evidence, since he is to the full as likely *not to be* descended from the line of the first purchasor, as *to be* descended; and therefore the inheritance shall go to the nearest relation possessed of this presumptive proof, the whole blood.

And, as this is the case in *feudis antiquis*, where there really did once exist a purchasing ancestor, who is forgotten; it is also the case in *feudis novis* held *ut antiquis*, where the purchasing ancestor is merely ideal, and never existed but only in fiction of law. Of this nature are all grants of lands

in fee-simple at this day, which are inheritable as if they descended from some uncertain indefinite ancestor, and therefore any of the collateral kindred of the real modern purchasor (and not his own offspring only) may inherit them, provided they be of the whole blood; for all such are, in judgment of law, likely enough to be derived from this indefinite ancestor: but those of the half blood are excluded, for want of the same probability. Nor should this be thought hard, that a brother of the purchasor, though only of the half blood, must thus be disinherited, and a more remote relation of the whole blood admitted, merely upon a supposition and fiction of law: since it is only upon a like supposition and fiction, that brethren of purchasors (whether of the whole or half blood) are entitled to inherit at all; for we have seen that *in feudis stricte novis* neither brethren nor any other collaterals [230] were admitted. As therefore in *feudis antiquis* we have seen the reasonableness of excluding the half blood, if by a fiction of law a *feudum novum* be made descendible to collaterals as if it was *feudum antiquum*, it is just and equitable that it should be subject to the same restrictions as well as the same latitude of descent.

Perhaps by this time the exclusion of the half blood does not appear altogether so unreasonable as at first sight it is apt to do. It is certainly a very fine-spun and subtle nicety; but considering the principles upon which our law is founded, it is not an injustice, nor always a hardship; since even the succession of the whole blood was originally a beneficial indulgence, rather than the strict right of collaterals; and though that indulgence is not extended to the demi-kindred, yet they are rarely abridged of any right which they could possibly have enjoyed before. The doctrine of the whole blood was calculated to supply the frequent impossibility of proving a descent from the first purchasor, without some proof of which (according to our fundamental maxim) there can be no inheritance allowed of. And this purpose it answers, for the most part, effectually enough. I speak with these restrictions, because it does not, neither can any other method, answer this purpose entirely. For though all the ancestors of John Stiles, above the common stock, are also the ancestors of his collateral kinsman of the whole blood:

yet, unless that common stock be in the first degree, (that is unless they have the same father and mother,) there will be intermediate ancestors, below the common stock, that belong to either of them respectively, from which the other is not descended, and therefore can have none of their blood. Thus, though John Stiles and his brother of the whole blood can each have no other ancestors than what are in common to them both; yet, with regard to his uncle where the common stock is removed one degree higher, (that is the grandfather and grandmother,) one half of John's ancestors will not be the ancestors of his uncle: his *patruus*, or father's brother, derives not his descent from John's maternal ancestors: nor his *avunculus*, or mother's brother, from those in the paternal
[231] line. Here then the supply of proof is deficient, and by no means amounts to a certainty: and the higher the common stock is removed, the more will even the probability decrease. But it must be observed, that (upon the same principles of calculation) the half blood have always a much less chance to be descended from an unknown indefinite ancestor of the deceased, than the whole blood in the same degree. As, in the first degree, the whole brother of John Stiles is sure to be descended from that unknown ancestor; his half brother has only an even chance, for half John's ancestors are not his. So, in the second degree, John's uncle of the whole blood has an even chance: but the chances are three to one against his uncle of the half blood, for three fourths of John's ancestors are not his. In like manner, in the third degree, the chances are only three to one against John's great-uncle of the whole blood, but they are seven to one against his great-uncle of the half blood, for seven-eighths of John's ancestors have no connexion in blood with him. Therefore the much less probability of the half blood's descent from the first purchasor, compared with that of the whole blood, in the several degrees, has occasioned a general exclusion of the half blood in all.

But, while I thus illustrate the reason of excluding the half blood in general, I must be impartial enough to own, that, in some instances, the practice is carried farther than the principle upon which it goes will warrant. Particularly when a kinsman of the whole blood in a remoter degree, as

the uncle or great-uncle, is preferred to one of the half blood in a nearer degree, as the brother; for the half brother hath the same chance of being descended from the purchasing ancestor as the uncle; and a thrice better chance than the great-uncle or kinsman in the third degree. (7) It is also more especially overstrained, when a man has two sons by different venters, and the estate on his death descends from him to the eldest, who enters and dies without issue; in which case the younger son cannot inherit this estate, because he is not of the whole blood to the last proprietor[a]. This, it must be owned, carries a hardship with it, even upon feodal [232] principles: for the rule was introduced only to supply the proof of a descent from the first purchasor; but here, as this estate notoriously descended from the father, and as both the brothers confessedly sprung from him, it is demonstrable that the half brother must be of the blood of the first purchasor, who was either the father or some of the father's ancestors. When, therefore, there is actual demonstration of the thing to be proved, it is hard to exclude a man by a rule substituted to supply that proof when deficient. So far as the inheritance can be evidently traced back, there seems no need of calling in this presumptive proof, this rule of probability, to investigate what is already certain. Had the elder brother, indeed, been a purchasor, there would have been no hardship at all, for the reasons already given: or had the *frater uterinus* only, or brother by the mother's side, been excluded from an inheritance which descended from the father, it had been highly reasonable.

[a] A still harder case than this happened, *M.* 10 *Edw. III.* On the death of a man, who had three daughters by a first wife, and a fourth by another, his lands descended equally to all four as coparceners. Afterwards the two eldest died without issue: and it was held, that the third daughter alone should inherit their shares, as being their heir of the whole blood; and that the youngest daughter should retain only her original fourth part of their common father's lands. (10 *Ass.* 27.) And yet it was clear law in *M.* 19 *Edw. II.* that where lands had descended to two sisters of the half-blood, as coparceners, each might be heir of those lands to the other. Mayn. Edw. II. 628. Fitz. *abr. tit. quare impedit.* 177.

(7) Mr. Christian observes correctly, that this should be twice; half brothers have half the same blood, great-uncle and great nephew one-fourth; it is, therefore, two to one

Indeed, it is this very instance, of excluding a *frater consanguineus*, or brother by the father's side, from an inheritance which descended *a patre*, that Craig[b] has singled out on which to ground his strictures on the English law of half blood. And, really, it should seem as if originally the custom of excluding the half blood in Normandy[c] extended only to exclude a *frater uterinus*, when the inheritance descended a *a patre*, and *vice versa*, and possibly in England also; as even with us it remained a doubt, in the time of Bracton[d], and of Fleta[e], whether the half blood on the father's side was excluded from the inheritance which originally descended from the common father, or only from such as descended from the respective mothers, and from newly-purchased lands. So also
[233] the rule of law, as laid down by our Fortescue[f], extends no farther than this: *frater fratri uterino non succedet in haereditate paterna.* It is moreover worthy of observation, that by our law, as it now stands, the crown (which is the highest inheritance in the nation) may descend to the half blood of the preceding sovereign[g], so that it be in the blood of the first monarch purchasor, or (in the feodal language) conqueror of the reigning family. Thus it actually did descend from king Edward the sixth to queen Mary, and from her to queen Elizabeth, who were respectively of the half blood to each other. For the royal pedigree being always a matter of sufficient notoriety, there is no occasion to call in the aid of this presumptive rule of evidence, to render probable the descent from the royal stock, which was formerly king William the Norman, and is now (by act of parliament[h]), the princess Sophia of Hanover. Hence also it is that in estates-tail, where the pedigree from the first donee must be strictly proved, half blood is no impediment to the descent[i]: because, when the lineage is clearly made out, there is no need of this auxiliary proof. How far it may be desirable for the legislature to give relief, by amending the law of descents in one or two instances, and ordaining that the half blood might always inherit, where the estate notoriously descended from its own proper ancestor, and in cases of new-

[b] *l.* 2. *t.* 15. § 14.
[c] *Gr. Coustum.* c. 25.
[d] *l.* 2. *c.* 30. § 3.
[e] *l.* 6. *c.* 1. § 14.
[f] *de laud. LL. Angl.* 5.
[g] Plowd. 245. Co. Litt. 15.
[h] 12 Will. III. c. 2.
[i] Litt. § 14, 15.

purchased lands, or uncertain descents, should never be excluded by the whole blood in a remoter degree; or how far a private inconvenience should be still submitted to, rather than a long-established rule should be shaken, it is not for me to determine. (8)

THE rule then, together with it's illustration, amounts to this: that, in order to keep the estate of John Stiles, as nearly as possible in the line of his purchasing ancestor, it must descend to the issue of the nearest couple of ancestors that have left descendants behind them; because the descendants of one ancestor only are not so likely to be in the line of that purchasing ancestor, as those who are descended from both.

BUT here another difficulty arises. In the second, third, [234] fourth, and every superior degree, every man has many couples of ancestors, increasing according to the distances in a geometrical progression upwards [k], the descendants of all which respective couples are (representatively) related to him in the same degree. Thus in the second degree, the issue of George and Cecilia Stiles and of Andrew and Esther Baker, the two grandsires and grandmothers of John Stiles, are each in the same degree of propinquity; in the third degree, the respective issues of Walter and Christian Stiles, of Luke and Frances Kempe, of Herbert and Hannah Baker, and of James and Emma Thorpe, are (upon the extinction of the two inferior degrees) all equally entitled to call themselves the next kindred of the whole blood to John Stiles. To which therefore of these ancestors must we first resort, in order to find out descendants to be preferably called to the inheritance? In answer to this, and likewise to avoid all other confusion and uncertainty that might arise between the several stocks wherein the purchasing ancestor may be sought for, another qualification is requisite, besides the *proxi-*

[k] See page 204.

(8) Though half-brothers cannot take immediately as heirs to each other, yet indirectly they may; as "if there be two brothers by divers venters, and the elder is seised of land in fee, and die without issue, and his uncle enter as next heire to him, who also dies without issue, now the yonger brother may have the land as heire to the uncle, for that he is of the whole blood to him." Litt. s. 8.

mity and *entirety*, which is that of *dignity* or *worthiness*, of blood. For,

VII. The seventh and last rule or canon is, that in collateral inheritances the male stocks shall be preferred to the female, (that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near,) — unless where the lands have, in fact, descended from a female.

Thus the relations on the father's side are admitted *in infinitum*, before those on the mother's side are admitted at all [l]; and the relations of the father's father, before those of the father's mother; and so on. And in this the English law is not singular, but warranted by the examples of the Hebrew and Athenian laws, as stated by Selden [m], and Petit [n]; though among the Greeks in the time of Hesiod [o], when a man died without wife or children, all his kindred
[235] (without any distinction) divided his estate among them. It is likewise warranted by the example of the Roman laws; wherein the *agnati*, or relations by the father, were preferred to the *cognati*, or relations by the mother, till the edict of the emperor Justinian [p] abolished all distinction between them. It is also conformable to the customary law of Normandy [q], which indeed in most respects agrees with our English law of inheritance.

However, I am inclined to think, that this rule of our law does not owe it's immediate original to any view of conformity to those which I have just now mentioned; but was established in order to effectuate and carry into execution the fifth rule, or principal canon of collateral inheritance, before laid down; that every heir must be of the blood of the first purchasor. For, when such first purchasor was not easily to be discovered after a long course of descents, the lawyers not only endeavoured to investigate him by taking the next relation of the whole blood to the person last in possession, but also, considering that a preference had been

[l] Litt. § 4.
[m] *de succ. Ebraeor.* c. 12.
[n] *L.L. Attic. l.* 1. *t.* 6.
[o] Θεογον, 606.
[p] *Nov.* 118.
[q] *Gr. Coustum.* c. 25.

given to males (by virtue of the second canon) through the whole course of lineal descent from the first purchasor to the present time, they judged it more likely that the lands should have descended to the last tenant from his male than from his female ancestors; from the father (for instance) rather than from the mother; from the father's father rather than from the father's mother: and therefore they hunted back the inheritance (if I may be allowed the expression) through the male line; and gave it to the next relations on the side of the father, the father's father, and so upwards; imagining with reason that this was the most probable way of continuing it in the line of the first purchasor. A conduct much more rational than the preference of the *agnati*, by the Roman laws: which, as they gave no advantage to the males in the first instance or direct lineal succession, had no reason for preferring them in the transverse collateral one; upon which account this preference was very wisely abolished by Justinian.

[236] THAT this was the true foundation of the preference of the *agnati* or male stocks in our law, will farther appear, if we consider, that, whenever the lands have notoriously descended to a man from his mother's side, this rule is totally reversed; and no relation of his by the father's side, as such, can ever be admitted to them; because he cannot possibly be of the blood of the first purchasor. And so, *e converso*, if the lands descended from the father's side, no relation of the mother, as such, shall ever inherit. So also, if they in fact descended to John Stiles, from his father's mother Cecilia Kempe; here not only the blood of Lucy Baker his mother, but also of George Stiles his father's father, is perpetually excluded. And, in like manner, if they be known to have descended from Frances Holland the mother of Cecilia Kempe, the line not only of Lucy Baker, and of George Stiles, but also of Luke Kempe the father of Cecilia, is excluded. Whereas, when the side from which they descended is forgotten, or never known, (as in the case of an estate newly purchased to be holden *ut feudum antiquum*,) here the right of inheritance first runs up all the father's side, with a preference to the male stocks in every instance; and, if it finds no heirs there, it then, and then only, resorts to the mother's side; leaving

no place untried, in order to find heirs that may by possibility be derived from the original purchasor. The greatest probability of finding such was among those descended from the male ancestors; but, upon failure of issue there, they may possibly be found among those derived from the females.

This I take to be the true reason of the constant preference of the agnatic succession, or issue derived from the male ancestors, through all the stages of collateral inheritance; as the ability for personal service was the reason for preferring the males at first in the direct lineal succession. We see clearly, that if males had been perpetually admitted, in utter exclusion of females, the tracing the inheritance back through the male line of ancestors must at last have inevitably brought us up to the first purchasor: but as males have not been
[287] *perpetually admitted*, but only *generally preferred*; as females have not been *utterly excluded*, but only *generally postponed* to males; the tracing the inheritance up through the male stocks will not give us absolute demonstration, but only a strong probability, of arriving at the first purchasor: which, joined with the other probability, of the wholeness or entirety of blood, will fall little short of a certainty.

Before we conclude this branch of our inquiries, it may not be amiss to exemplify these rules by a short sketch of the manner in which we must search for the heir of a person, as *John Stiles*, who dies seised of land which he acquired, and which therefore he held as a feud of indefinite antiquity [r].

In the first place succeeds the eldest son, Matthew Stiles, or his issue: (n° 1.) — if his line be extinct, then Gilbert Stiles, and the other sons respectively, in order of birth, or their issue: (n° 2.) — in default of these, all the daughters together, Margaret and Charlotte Stiles, or their issue: (n° 3.) — On failure of the descendants of *John Stiles*, himself, the issue of Geoffrey and Lucy Stiles, his parents, is called in: *viz.* first, Francis Stiles, the eldest brother of the whole blood, or his issue; (n° 4.) — then Oliver Stiles, and the other whole brothers, respectively, in order of birth, or

[r] See the table of descents annexed.

their issue; n° 5.) — then the sisters of the whole blood all together, Bridget and Alice Stiles, or their issue: (n° 6.) — In defect of these, the issue of George and Cecilia Stiles, his father's parents; respect being still had to their age and sex: (n° 7.) — then the issue of Walter and Christian Stiles the parents of his paternal grandfather: (n° 8.) — then the issue of Richard and Anne Stiles, the parents of his paternal grandfather's father, (n° 9.) — and so on in the paternal grandfather's paternal line, or blood of Walter Stiles, *in infinitum*. In defect of these, the issue of William and Jane Smith, the parents of his paternal grandfather's mother: (n° 10.) — and so on in the paternal grandfather's maternal line, or blood of Christian Smith, *in infinitum*: till both the immediate bloods of George Stiles, the paternal grandfather, are spent. — Then we must resort to the issue of Luke and Frances Kempe, the parents of *John Stiles*'s paternal grand- [238] mother: (n° 11.) — then to the issue of Thomas and Sarah Kempe, the parents of his paternal grandmother's father: (n° 12.) — and so on in the paternal grandmother's paternal line, or blood of Luke Kempe, *in infinitum*. — In default of which we must call in the issue of Charles and Mary Holland, the parents of his paternal grandmother's mother: (n° 13.) — and so on in the paternal grandmother's maternal line, or blood of Frances Holland, *in infinitum*; till both the immediate bloods of Cecilia Kempe, the paternal grandmother, are also spent. — Whereby the paternal blood of *John Stiles* entirely failing, recourse must then, and not before, be had to his maternal relations; or the blood of the Bakers, (n° 14, 15, 16.) Willis's, (n° 17.) Thorpe's, (n° 18, 19.) and White's (n° 20.) in the same regular, successive order, as in the paternal line.

THE student should however be informed, that the class, n° 10, would be postponed to n° 11, in consequence of the doctrine laid down, *arguendo*, by justice Manwoode, in the case of Clere and Brooke[t]; from whence it is adopted by lord Bacon[u], and sir Matthew Hale[u]: because, it is said, that all the female ancestors on the part of the father are

[t] Plowd. 450.

[u] H. C. L. 240. 244. Elem. c. 1.

equally worthy of blood; and in that case proximity shall prevail. And yet, notwithstanding these respectable authorities, the compiler of this table hath ventured (in point of theory, for the case never yet occurred in practice) to give the preference to n° 10 before n° 11; for the following reasons: 1. Because this point was not the principal question in the case of Clere and Brooke; but the law concerning it is delivered *obiter* only, and in the course of argument by justice Manwoode; though afterwards said to be confirmed by the three other justices in separate, extrajudicial conferences with the reporter. 2. Because the chief justice, sir James Dyer, in reporting the resolution of the court in what seems to be the same case, [w] takes no notice of this doctrine. 3. Because it appears from Plowden's report that very many gentlemen of the law were dissatisfied with this position of justice Manwoode; since the blood of n° 10 was derived to
[239] the purchasor through a greater number of males than the blood of n° 11, and was therefore in their opinion the more worthy of the two. 4. Because the position itself destroys the otherwise entire and regular symmetry of our legal course of descents, as is manifest by inspecting the table; wherein n° 16, which is analogous in the maternal line to n° 10 in the paternal, is preferred to n° 18, which is analagous to n° 11, upon the authority of the eighth rule laid down by Hale himself; and it destroys also that constant preference of the male stocks in the law of inheritance, for which an additional reason is before [x] given, besides the mere dignity of blood. 5. Because it introduces all that uncertainty and contradiction, which is pointed out by an ingenious author [y]; and establishes a collateral doctrine (*viz.* the preference of n° 11 to n° 10) seemingly, though perhaps not strictly, incompatible with the principal point resolved in the case of Clere and Brooke, *viz.* the preference of n° 11 to n° 14. And, though that learned writer proposes to rescind the principal point then resolved, in order to clear this difficulty; it is apprehended, that the difficulty may be better cleared, by rejecting the collateral doctrine, which was never yet resolved at all. 6. Because the reason that is given for this doctrine

[w] Dyer, 314.
[x] Pag. 235, 6, 7.
[y] Law of inheritances, 2d edit. pag. 30. 38. 61, 62. 66.

by lord Bacon (*viz.* that in any degree, paramount the first, the law respecteth proximity, and not dignity of blood) is directly contrary to many instances given by Plowden and Hale, and every other writer on the law of descents. 7. Because this position seems to contradict the allowed doctrine of sir Edward Coke [z]; who lays it down (under different names,) that the blood of the Kempes (*alias* Sandies) shall not inherit till the blood of the Stiles's (*alias* Fairfields) fail. Now the blood of the Stiles's does certainly not fail, till both n° 9 and n° 10 are extinct. Wherefore n° 11 (being the blood of the Kempes) ought not to inherit till then. 8. Because in the case, Mich. 12 Edw. IV. 14. [a] (much relied on in that of Clere and Brooke) it is laid down as a rule, that "*cestuy, que doit inheriter al pere, doit inheriter al fits.*" [b] And so sir Matthew Hale [c] says, "that though the law excludes the father from inheriting, yet it substitutes and [240] "directs the descent as it should have been had the father inherited." Now it is settled, by the resolution of Clere and Brooke, that n° 10 should have inherited before n° 11 to Geoffrey Stiles, the father, had he been the person last seised; and therefore n° 10 ought also to be preferred in inheriting to *John Stiles*, the son.

In case *John Stiles* was not himself the purchasor, but the estate in fact came to him by descent from his father, mother, or any higher ancestor, there is this difference; that the blood of that line of ancestors, from which it did not descend, can never inherit: as was formerly fully explained [d]. And the like rule, as there exemplified, will hold upon descents from any other ancestors.

The student should also bear in mind, that during this whole process, *John Stiles* is the person supposed to have been last actually seised of the estate. For if ever it comes to vest in any other person, as heir to *John Stiles*, a new order of succession must be observed upon the death of such heir; since he, by his own seisin, now becomes himself an

[z] Co. Litt. 12. Hawk. abr. *in loc.*
[a] Fitzh. *Abr. tit. discent.* 2. Bro. *Abr. tit. discent.* 38.
[b] See pag. 228.
[c] Hist. C. L. 243.
[d] See page 236.

ancestor or *stipes*, and must be put in the place of *John Stiles*. The figures therefore denote the order in which the several classes would succeed to *John Stiles*, and not to each other: and before we search for an heir in any of the higher figures, (as n° 8) we must be first assured that all the lower classes (from n° 1 to n° 7) were extinct, at *John Stiles*'s decease.

CHAPTER THE FIFTEENTH.

OF TITLE BY PURCHASE, AND FIRST BY ESCHEAT.

PURCHASE, *perquisitio*, taken in it's largest and most extensive sense is thus defined by Littleton [a], the possession of lands and tenements which a man hath by his own act or agreement, and not by descent from any of his ancestors or kindred. In this sense it is contradistinguished from acquisition by right of blood, and includes every other method of coming to an estate, but merely that by inheritance: wherein the title is vested in a person, not by his own act or agreement, but by the single operation of law [b].

PURCHASE, indeed, in it's vulgar and confined acceptation, is applied only to such acquisitions of land, as are obtained by way of bargain and sale for money, or some other valuable consideration. But this falls far short of the legal idea of purchase: for, if I *give* land freely to another, he is in the eye of the law a purchasor [c], and falls within Littleton's definition, for he comes to the estate by his own agreement: that is, he consents to the gift. A man who has his father's estate, settled upon him in tail, before he was born, is also a purchasor: for he takes quite another estate than the law of descents would have given him. Nay, even if the ancestor devises his estate to his heir at law by will, with other limitations, or in any other shape than the course of descents would direct, such heir shall take by purchase [d]. But if a

[a] § 12.
[b] Co. Litt. 18.
[c] Co. Litt. 18.
[d] Lord Raym. 728.

man seised in fee, devises his whole estate to his heir at law, so that the heir takes neither a greater nor a less estate by
[242] the devise than he would have done without it, he shall be adjudged to take by descent [e], even though it be charged with incumbrances [f]; this being for the benefit of creditors, and others, who have demands on the estate of the ancestor. (1) If a remainder be limited to the heirs of Sempronius, here Sempronius himself takes nothing; but if he dies during the continuance of the particular estate, his heirs shall take as purchasors [g]. But if an estate be made to A for life, remainder to his right heirs in fee, his heirs shall take by descent: for it is an antient rule of law, that wherever the ancestor takes an estate for life, the heir cannot by the same conveyance take an estate in fee by *purchase*, but only by *descent* [h]. (2) And if A dies before entry, still his heirs shall take by descent, and not by purchase: for where the heir takes any thing that might have vested in the ancestor, he takes by way of descent [i]. The ancestor, during his life, beareth in himself all his heirs [k]; and therefore, when once he is or might have been seised of the lands, the inheritance so limited to his heirs vests in the ancestor himself: and the word "heirs" in this case is not esteemed a word of *purchase*, but a word of *limitation*, enuring so as to increase the estate of the ancestor from a tenancy for life to a fee-simple. And, had it been otherwise, had the heir (who is uncertain till the death of the ancestor) been allowed to take as a purchasor originally

[e] 1 Roll. Abr. 626.
[f] Salk. 241. Lord Raym. 728.
[g] 1 Roll. Abr. 627.
[h] 1 Rep. 104. 2 Lev. 60. Raym. 334.
[i] 1 Rep. 98.
[k] Co. Litt. 22.

(1) This reason has ceased to exist with regard to the debts of the ancestor, since the 3 & 4 W. & M. c. 14. which see, post, p. 378. But this was not the only reason why the law favoured a taking by descent, rather than by devise; it was more advantageous for the taker himself, as it gave him the benefit of warranties of title, and it took away the entry of any person whom his ancestor had disseised; and it also preserved the feudal rights of the lord.

(2) This is what is commonly known by the name of the "Rule in Shelley's Case," which has perhaps called forth more learning and talent in its discussion than any other principle in the law. I refer the student to the note of Mr. Butler, Co. Litt. 376 b. n. 1.; and the references which he will there find to the works of Mr. Hargrave and Mr. Fearne.

nominated in the deed, as must have been the case if the remainder had been expressly limited to Matthew or Thomas by name: then, in the times of strict feodal tenure, the lord would have been defrauded by such a limitation of the fruits of his signiory arising from a descent to the heir.

WHAT we call *purchase*, *perquisitio*, the feudists called *conquest*, *conquaestus*, or *conquisitio* [l]: both denoting any means of acquiring an estate out of the common course of inheritance. And this is still the proper phrase in the law of Scotland [m]: as it was among the Norman jurists, who styled the first purchasor (that is, he who brought the estate into the family which at present owns it) the conqueror or *conquereur* [n]. Which seems to be all that was meant by the appellation which was given to William the Norman, when his manner of ascending the throne of England was, in his own and his successors' charters, and by the historians of the times entitled *conquaestus*, and himself *conquaestor* or *conquisitor* [o]: signifying that he was the first of his family who acquired the crown of England, and from whom therefore all future claims by descent must be derived: though now, from our disuse of the feodal sense of the word, together with the reflection on his forcible method of acquisition, we are apt to annex the idea of *victory* to this name of *conquest* or *conquisition*: a title which, however just with regard to the *crown*, the conqueror never pretended with regard to the *realm* of England; nor, in fact, ever had [p]. [243]

THE difference in effect, between the acquisition of an estate by descent and by purchase, consists principally in these two points: 1. That by purchase the estate acquires a new inheritable quality, and is descendible to the owner's blood in general, and not the blood only of some particular ancestor. For, when a man takes an estate by purchase, he takes it not *ut feudum paternum* or *maternum*, which would descend only to the heirs by the father's or the mother's side: but he takes it *ut feudum antiquum*, as a feud of indefinite antiquity, whereby it becomes inheritable to his heirs general, first of the paternal, and then of the maternal line. 2. An

[l] Craig. *l.* 1. *t.* 10. § 18.
[m] Dalrymple of feuds, 210.
[n] *Gr. Coustum. Gloss. c.* 25. *pag.* 40.
[o] Spelm. *Gloss.* 145.
[p] See Book I. ch. 3.

estate taken by purchase will not make the heir answerable for the acts of the ancestor, as an estate by descent will. For if the ancestor, by any deed, obligation, covenant, or the like, bindeth himself and his heirs, and dieth; this deed, obligation, or covenant, shall be binding upon the heir, so far forth only as he (or any other in trust for him [q]) had any estate of inheritance vested in him by descent from (or any estate *per auter vie* coming to him by special occupancy, as
[244] heir to [r]) that ancestor, sufficient to answer the charge [s]; whether he remains in possession, or hath alienated it before action brought [t]; which sufficient estate is in the law called *assets*; from the French word *assez*, enough [u]. Therefore if a man covenants, for himself and his heirs, to keep my house in repair, I can then (and then only) compel his heir to perform this covenant, when he has an estate sufficient for this purpose, or *assets*, by descent from the covenantor: for though the covenant descends to the heir, whether he inherits any estate or no, it lies dormant, and is not compulsory, until he has assets by descent [v].

This is the legal signification of the word *perquisitio*, or purchase; and in this sense it includes the five following methods of acquiring a title to estates: 1. Escheat. 2. Occupancy. 3. Prescription. 4. Forfeiture. 5. Alienation. Of all these in their order.

I. Escheat, we may remember [w], was one of the fruits and consequences of feodal tenure. The word itself is originally French or Norman [x], in which language it signifies chance or accident; and with us it denotes an obstruction of the course of descent, and a consequent determination of the tenure, by some unforeseen contingency: in which case the land naturally results back, by a kind of reversion, to the original grantor or lord of the fee [y]. (3)

[q] Stat. 29 Car. II. c. 3. § 10.
[r] *Ibid.* § 12.
[s] 1 P. Wms. 777.
[t] Stat. 3 & 4 W. & M. c. 14.
[u] Finch law, 112.
[v] Finch. Rep. 86.
[w] See pag. 72.
[x] *Escheat* or *échet*, formed from the verb *eschoir* or *échoir*, to happen.
[y] 1 *Feud.* 86. Co. Litt. 13.

(3) As escheat is founded upon a failure of the blood of the person last *seised*, it will follow, that if the tenant alienes before his death, and so does

ESCHEAT therefore being a title frequently vested in the lord by inheritance, as being the fruit of a signiory to which he was entitled by descent, (for which reason the lands escheated shall attend the signiory, and be inheritable by such only of his heirs as are capable of inheriting the other [z],) it may seem in such cases to fall more properly under the former general head of acquiring title to estates, *viz.* by descent, (being vested in him by act of law, and not by his own act or agreement,) than under the present, by purchase. But it [245] must be remembered that, in order to complete this title by escheat, it is necessary that the lord perform an act of his own, by *entering* on the lands and tenements so escheated, or suing out a *writ of escheat* [a]: on failure of which, or by doing any act that amounts to an implied waiver of his right, as by accepting homage or rent of a stranger who usurps the possession, his title by escheat is barred [b]. (4) It is therefore in some respect a title acquired by his own act, as well as by act of law. Indeed this may also be said of descents themselves, in which an entry or other seisin is required, in order to make a complete title: and therefore this distribution of titles by our legal writers, into those by descent and by purchase, seems in this respect rather inaccurate, and not marked with sufficient precision: for, as escheats must follow the nature of the signiory to which they belong, they may vest by either purchase or descent, according as the signiory is vested. And, though sir Edward Coke considers the lord by escheat as in some respects the assignee of the last tenant [c], and therefore taking by purchase; yet, on the other hand, the lord is more frequently considered as being *ultimus haeres*,

[z] Co. Litt. 13.
[a] Bro. *Abr. tit. escheat.* 26.
[b] Bro. *Abr. tit. acceptance*, 25. Co. Litt. 263.
[c] 1 Inst. 215.

not die seised, the escheat is prevented. And as a devise, though it does not take actual effect till the death of the devisor, yet is in the nature of a conveyance operating only on the lands belonging to the testator at the time of the execution, and declaring certain uses to which they shall be subject at the moment of his death, it is allowed to have the same effect. Cruise Dig. Escheat, 19. 21.

(4) According to the authorities cited for this passage in the text, the acceptance of rent is not a general bar to the title by escheat, but only under certain circumstances.

and therefore taking by descent in a kind of caducary succession.

The law of escheats is founded upon this single principle, that the blood of the person last seised in fee-simple, is by some means or other, utterly extinct and gone; and, since none can inherit his estate but such as are of his blood and consanguinity, it follows as a regular consequence, that when such blood is extinct, the inheritance itself must fail; the land must become what the feodal writers denominate *feudum apertum*; and must result back again to the lord of the fee, by whom, or by those whose estate he hath, it was given.

Escheats are frequently divided into those *propter defectum sanguinis*, and those *propter delictum tenentis*: the one sort, if the tenant dies without heirs; the other, if his blood be attainted [d]. But both these species may well be comprehended
[246] under the first denomination only; for he that is attainted suffers an extinction of his blood, as well as he that dies without relations. The inheritable quality is expunged in one instance, and expires in the other; or, as the doctrine of escheats is very fully expressed in Fleta [e], "*dominus capitalis* "*feodi loco haeredis habeter, quoties per defectum vel delictum* "*extinguitur sanguis tenentis.*"

Escheats therefore arising merely upon the deficiency of the blood, whereby the descent is impeded, their doctrine will be better illustrated by considering the several cases wherein hereditary blood may be deficient, than by any other method whatsoever.

1, 2, 3. The first three cases, wherein inheritable blood is wanting, may be collected from the rules of descent laid down and explained in the preceding chapter, and therefore will need very little illustration or comment. First, when the tenant dies without any relations on the part of any of his ancestors: secondly, when he dies without any relations on the part of those ancestors from whom his estate descended; thirdly, when he dies without any relations of the

[d] Co. Litt. 13, 92. [e] *l.* 6. *c.* 1.

whole blood. In two of these cases the blood of the first purchasor is certainly, in the other it is probably, at an end; and therefore in all of them, the law directs, that the land shall escheat to the lord of the fee; for the lord would be manifestly prejudiced, if, contrary to the inherent condition tacitly annexed to all feuds, any person should be suffered to succeed to the lands, who is not of the blood of the first feudatory, to whom for his personal merit the estate is supposed to have been granted.

4. A MONSTER, which hath not the shape of mankind, but in any part evidently bears the resemblance of the brute creation, hath no inheritable blood, and cannot be heir to any land albeit it be brought forth in marriage: but, although it hath deformity in any part of it's body, yet if it hath human shape it may be heir [f]. This is a very antient [247] rule in the law of England [g]; and it's reason is too obvious, and too shocking, to bear a minute discussion. The Roman law agrees with our own in excluding such births from successions [h]: yet accounts them, however, children in some respects, where the parents, or at least the father, could reap any advantage thereby [i]: (as the *jus trium liberorum*, and the like) esteeming them the misfortune, rather than the fault, of that parent. But our law will not admit a birth of this kind to be such an issue, as shall entitle the husband to be tenant by the curtesy [k]; because it is not capable of inheriting. And therefore, if there appears no other heir than such a prodigious birth, the land shall escheat to the lord.

5. BASTARDS are incapable of being heirs. Bastards, by our law, are such children as are not born either in lawful

[f] Co. Litt. 7, 8.

[g] *Qui contra formam humani generis converso more procreantur, veluti si mulier monstruosum vel prodigiosum enixa sit, inter liberos non computentur. Partus autem qui membrorum officia ampliavit, ut si sex digitos habeat vel si quatuor tantum, vel si tantum unum, talis inter liberos connumerabitur.* Bract. *l.* 1. *c.* 6. § 7. *Sed non dico partum monstruosum licet natura membra minuerit, vel ampliaverit; minuerit ut in defectu digitorum, vel hujus modi; ampliaverit, ut si plures digitos, vel articulos sicut sex vel plures, ubi non debet habere nisi quinque, si inutilia natura reddiderit membra, ut si curvus fuerit, vel gibbosus, vel membra tortuosa haberet. Ibid.* l. v. *tr.* 5. *c.* 30. § 10.

[h] *Ff.* 1. 5. 14.

[i] *Ff.* 50. 16. 135. Paul. 4. *sent.* 9. § 63.

[k] Co. Litt. 29.

wedlock, or within a competent time after it's determination. Such are held to be *nullius filii*, the sons of nobody; for the maxim of law is, *qui ex damnato coitu nascuntur, inter liberos non computantur*[m]. Being thus the sons of nobody, they have no blood in them, at least no inheritable blood; consequently, none of the blood of the first purchasor: and, therefore, if there be no other claimant than such illegitimate children, the land shall escheat to the lord[n]. The civil law differs from ours in this point, and allows a bastard to succeed to an inheritance, if after it's birth the mother was married to the father[o]: and also, if the father had no lawful wife or child, then, even if the concubine was never married to the father, yet she and her bastard son were admitted each to one-twelfth of the inheritance[p]: and a bastard was likewise capable of
[248] succeeding to the whole of his mother's estate, although she was never married; the mother being sufficiently certain, though the father is not[q]. But our law, in favour of marriage, is much less indulgent to bastards.

There is, indeed, one instance, in which our law has shewn them some little regard; and that is usually termed the case of *bastard eigné* and *mulier puisné*. This happens when a man has a bastard son, and afterwards marries the mother, and by her has a legitimate son, who, in the language of the law, is called a *mulier*, or, as Glanvil[r] expresses it in his Latin, *filius mulieratus*; the woman before marriage being *concubina*, and afterwards *mulier*. Now here the eldest son is bastard, or *bastard eigné*; and the younger son is legitimate, or *mulier puisné*. If then the father dies, and the *bastard eigné* enters upon his land, and enjoys it to his death, and dies seised thereof, whereby the inheritance descends to his issue; in this case the *mulier puisné*, and all other heirs, (though minors, feme-coverts, or under any incapacity whatsoever,) are totally barred of their right[s]. And this, 1. As a punishment on the *mulier* for his negligence, in not entering during the *bastard*'s life, and evicting him. 2. Because the law will not suffer a man to be a bastardized after his death, who entered

[l] See Book I. ch. 16.
[m] Co. Litt. 8. Bract. *l.* 1. *c.* 6. § 7.
[n] Finch. law, 117.
[o] Nov. 89. *c.* 8.
[p] *Ibid. c.* 12.
[q] *Cod.* 6. 57. 5.
[r] *l.* 7. *c.* 1.
[s] Litt. § 399. Co. Litt. 244.

as heir and died seised, and so passed for legitimate in his lifetime. 3. Because the canon law (following the civil) did allow such *bastard eigné* to be legitimate on the subsequent marriage of his mother; and, therefore, the laws of England (though they would not admit either the civil or canon law to rule the inheritances of this kingdom, yet) paid such a regard to a person thus peculiarly circumstanced, that, after the land had descended to his issue, they would not unravel the matter again, and suffer his estate to be shaken. But this indulgence was shewn to no other kind of bastard; for, if the mother was never married to the father, such bastard could have no colourable title at all [t]. (5)

As bastards cannot be heirs themselves, so neither can they [249] have any heirs but those of their own bodies. For, as all collateral kindred consists in being derived from the same common ancestor, and as a bastard has no legal ancestors, he can have no collateral kindred; and, consequently, can have no legal heirs, but such as claim by a lineal descent from himself. And, therefore, if a bastard purchases land and dies seised thereof without issue, and intestate, the land shall escheat to the lord of the fee [u].

6. ALIENS [v], also, are incapable of taking by descent, or inheriting [w]: for they are not allowed to have any inheritable blood in them; rather indeed upon a principle of national or civil policy, than upon reasons strictly feodal. Though, if lands had been suffered to fall into their hands who owe no

[t] Litt. § 400.
[u] Bract. *l.* 2. *c.* 7. Co. Litt. 244.
[v] See Book I. ch. 10.
[w] Co. Litt. 8.

(5) The second reason is not true generally, for in all other cases but this a man may be bastardized after his death, not indeed in the spiritual courts, which proceed only in *salutem animæ*, but in the temporal, where the rights of third persons depend on his legitimacy. See *Pride* v. *Earls of Bath* and *Montague*. 1 Salk. 120.

The rule itself prevails equally as to daughters; "if a man hath issue two daughters (by the same woman) the eldest being a bastard, and they enter and occupy peaceably as heirs; now the law in favour of legitimation shall not adjudge the whole possession in the mulier, who then had the only right, but in both, so as if the bastard hath issue and dieth, her issue shall inherit." Co. Litt. 244.

allegiance to the crown of England, the design of introducing our feuds, the defence of the kingdom, would have been defeated. Wherefore, if a man leaves no other relations but aliens, his land shall escheat to the lord. (6)

As aliens cannot inherit, so far they are on a level with bastards; but as they are also disabled to hold by purchase [x], they are under still greater disabilities. And, as they can neither hold by purchase, nor by inheritance, it is almost superfluous to say that they can have no heirs, since they can have nothing for an heir to inherit; but so it is expressly holden [y], because they have not in them any inheritable blood.

And farther, if an alien be made a denizen by the king's letters patent, and then purchases lands, (which the law allows such a one to do,) his son, born before his denization, shall not (by the common law) inherit those lands; but a son born afterwards may, even though his elder brother be living; for the father, before denization, had no inheritable blood to communicate to his eldest son; but by denization it acquires
[250] an hereditary quality, which will be transmitted to his subsequent posterity. Yet if he had been naturalized by act of parliament, such eldest son might then have inherited; for that cancels all defects, and is allowed to have a retrospective energy, which simple denization has not [z].

Sir Edward Coke [a] also holds, that if an alien cometh into England, and there hath issue two sons, who are thereby natural-born subjects; and one of them purchases land, and dies; yet neither of these brethren can be heir to the other. For the *commune vinculum*, or common stock of their consanguinity, is the father; and as he had no inheritable blood in him, he could communicate none to his sons; and, when the sons can by no possibility be heirs to the father, the one

[x] Co. Litt. 2.
[y] *Ibid.* 1 Lev. 59.
[z] Co. Litt. 129.
[a] 1 Inst. 8.

(6) See ante, vol. i. p. 371. As to the reason here given for excluding aliens from taking by descent, it may be observed that permanent property in land would create an equally permanent debt of allegiance to the crown; but it would be probably an allegiance inconsistent with that which the party naturally owed elsewhere.

of them shall not be heir to the other. And this opinion of his seems founded upon solid principles of the antient law: not only from the rule before cited [b], that *cestuy, que doit inheriter al pere, doit inheriter al fits:* but also because we have seen that the only feodal foundation, upon which newly purchased land can possibly descend to a brother, is the supposition and fiction of law, that it descended from some one of his ancestors; but in this case, as the intermediate ancestor was an alien, from whom it could by no possibility descend, this should destroy the supposition, and impede the descent, and the land should be inherited *ut feudum stricte novum;* that is, by none but the lineal descendants of the purchasing brother; and on failure of them, should escheat to the lord of the fee. But this opinion hath been since over-ruled [c]: and it is now held for law, that the sons of an alien born here, may inherit to each other; the descent from one brother to another being an *immediate* descent [d]. And reasonably enough upon the whole; for, as (in common purchases) the whole of the supposed descent from indefinite ancestors is but fictitious, the law may as well suppose the requisite ancestor as suppose the requisite descent.

[251] It is also enacted, by the statute 11 & 12 W. III. c. 6. that all persons, being natural-born subjects of the king, may inherit and make their titles by descent from any of their ancestors lineal or collateral; although their father or mother, or other ancestor, by, from, through, or under whom they derive their pedigrees, were born out of the king's allegiance. But inconveniences were afterwards apprehended, in case persons should thereby gain a future capacity to inherit, who did not exist at the death of the person last seised. As, if Francis the elder brother of John Stiles be an alien, and Oliver the younger be a natural-born subject, upon John's death without issue his lands will descend to Oliver the younger brother: now, if afterwards Francis has a child born in England, it was feared that, under the statute of king William, this new-born child might defeat the estate of his uncle Oliver. Wherefore it is provided, by the statute 25 Geo. II. c. 39. that no right of inheritance shall accrue by

[b] See pag. 223. and 239.
[c] 1 Ventr. 413. 1 Lev. 59. 1 Sid. 193.
[d] See pag. 226.

virtue of the former statute to any persons whatsoever unless they are in being and capable to take as heirs at the death of the person last seised: — with an exception, however, to the case, where lands shall descend to the daughter of an alien; which descent shall be divested in favour of an after-born brother, or the inheritance shall be divided with an after-born sister or sisters, according to the usual rule[d] of descents by the common law.

7. By attainder also, for treason or other felony, the blood of the person attainted is so corrupted, as to be rendered no longer inheritable.

Great care must be taken to distinguish between forfeiture of lands to the king, and this species of escheat to the lord; which, by reason of their similitude in some circumstances, and because the crown is very frequently the immediate lord of the fee, and therefore entitled to both, have been often confounded together. Forfeiture of lands, and of whatever else the offender possessed, was the doctrine of the old Saxon
[252] law[e], as a part of punishment for the offence; and does not at all relate to the feodal system, nor is the consequence of any signiory or lordship paramount[f]: but, being a prerogative vested in the crown, was neither superseded nor diminished by the introduction of the Norman tenures; a fruit and consequence of which, escheat must undoubtedly be reckoned. Escheat, therefore, operates in subordination to this more antient and superior law of forfeiture.

The doctrine of escheat upon attainder, taken singly, is this: that the blood of the tenant, by the commission of any felony, (under which denomination all treasons were formerly comprized[g],) is corrupted and stained, and the original donation of the feud is thereby determined, it being always granted to the vasal on the implied condition of *dum bene se gesserit.* Upon the thorough demonstration of which guilt, by legal attainder, the feodal covenant and mutual bond of fealty are held to be broken, the estate instantly falls back

[d] See pag. 208 and 214.
[e] *LL. Aelfred.* c. 4. *LL. Canut.* c. 54.
[f] 2 Inst. 64. Salk. 85.
[g] 3 Inst. 15. Stat. 25 Edw. III. c. 2. § 12.

from the offender to the lord of the fee, and the inheritable quality of his blood is extinguished and blotted out for ever. In this situation the law of feodal escheat was brought into England at the conquest; and in general superadded to the antient law of forfeiture. In consequence of which corruption and extinction of hereditary blood, the land of all felons would immediately revest in the lord, but that the superior law of forfeiture intervenes, and intercepts it in it's passage: in case of treason, for ever; in case of other felony, for only a year and a day; after which time it goes to the lord in a regular course of escheat [h], as it would have done to the heir of the felon in case the feodal tenures had never been introduced. And that this is the true operation and genuine history of escheats will most evidently appear from this incident to gavelkind lands (which seems to be the old Saxon tenure,) that they are in no case subject to escheat for felony, though they are liable to forfeiture for treason [i].

As a consequence of this doctrine of escheat, all lands of [253] inheritance immediately revesting in the lord, the wife of the felon was liable to lose her dower, till the statute 1 Edw. VI. c. 12. enacted, that albeit any person be attainted of misprision of treason, murder, or felony, yet his wife shall enjoy her dower. But she has not this indulgence where the antient law of forfeiture operates, for it is expressly provided by the statute 5 & 6 Edw. VI. c. 11. that the wife of one attaint of high treason shall not be endowed at all. (7)

HITHERTO we have only spoken of estates vested in the offender, at the time of his offence or attainder. And here the law of forfeiture stops; but the law of escheat pursues the matter still farther. For the blood of the tenant being

[h] 2 Inst. 36. [i] Somner. 53. Wright, Ten. 118.

(7) The 1 E. 6. c. 12. s. 17. ordained that attainder of treason, petit treason, misprision of treason, murder, or any felony, should not prevent the wife of her dower; the 5 & 6 E. 6. c. 11. s. 13. restored the old law in the case of all treasons "whatsoever they be." The wife, therefore, is barred by the attainder of her husband for petit treason as well as high. See Co. Litt. 37. a. Staundf. 195. b.

utterly corrupted and extinguished, it follows not only that all that he now has shall escheat from him, but also that he shall be incapable of inheriting any thing for the future. This may farther illustrate the distinction between forfeiture and escheat. If, therefore, a father be seised in fee, and the son commits treason and is attainted, and then the father dies; here the lands shall escheat to the lord; because the son, by the corruption of his blood, is incapable to be heir, and there can be no other heir during his life; but nothing shall be forfeited to the king, for the son never had any interest in the lands to forfeit [k]. In this case the escheat operates, and not the forfeiture; but in the following instance the forfeiture works, and not the escheat. As where a new felony is created by act of parliament, and it is provided (as is frequently the case) that it shall not extend to corruption of blood; here the lands of the felon shall not escheat to the lord, but yet the profits of them shall be forfeited to the king for a year and a day, and so long after as the offender lives [l].

There is yet a farther consequence of the corruption and extinction of hereditary blood, which is this: that the person
[254] attainted shall not only be incapable himself of inheriting, or transmitting his own property by heirship, but shall also obstruct the descent of lands or tenements to his posterity, in all cases where they are obliged to derive their title through him from any remoter ancestor. The channel which conveyed the hereditary blood from his ancestors to him, is not only exhausted for the present, but totally dammed up and rendered impervious for the future. This is a refinement upon the antient law of feuds, which allowed that the grandson might be heir to his grandfather, though the son in the intermediate generation was guilty of felony [m]. But, by the law of England, a man's blood is so universally corrupted by attainder, that his sons can neither inherit to him nor to any other ancestors [n], at least on the part of their attainted father.

This corruption of blood cannot be absolutely removed but by authority of parliament. The king may excuse the

[k] Co. Litt. 13.
[l] 3 Inst. 47.
[m] Van Leeuwen *in* 2 *Feud.* 31.
[n] Co. Litt. 391.

public punishment of an offender; but cannot abolish the private right, which has accrued or may accrue to individuals as a consequence of the criminal's attainder. He may remit a forfeiture, in which the interest of the crown is alone concerned: but he cannot wipe away the corruption of blood; for therein a third person hath an interest, the lord who claims by escheat. If therefore a man hath a son, and is attainted, and afterwards pardoned by the king; this son can never inherit to his father, or father's ancestors; because his paternal blood, being once thoroughly corrupted by his father's attainder, must continue so: but if the son had been born after the pardon, he might inherit; because by the pardon the father is made a new man, and may convey new inheritable blood to his after-born children [o].

HEREIN there is however a difference between aliens and persons attainted. Of aliens, who could never by any possibility be heirs, the law takes no notice: and therefore we have seen, that an alien elder brother shall not impede the descent [255] to a natural-born younger brother. But in attainders it is otherwise; for if a man hath issue a son, and is attainted, and afterwards pardoned, and then hath issue a second son, and dies; here the corruption of blood is not removed from the eldest, and therefore he cannot be heir; neither can the youngest be heir, for he hath an elder brother living, of whom the law takes notice, as he once had a possibility of being heir: and therefore the younger brother shall not inherit, but the land shall escheat to the lord: though had the elder died without issue in the life of the father, the younger son born after the pardon might well have inherited, for he hath no corruption of blood [p]. So if a man hath issue two sons, and the elder in the lifetime of the father hath issue, and then is attainted and executed, and afterwards the father dies, the lands of the father shall not descend to the younger son: for the issue of the elder, which had once a possibility to inherit, shall impede the descent to the younger, and the land shall escheat to the lord [q]. Sir Edward Coke in this case allows [r], that if the ancestor be attainted, his sons born before the attainder may be heirs to

[o] Co. Litt. 392. [p] *Ibid.* 8. [q] Dyer. 48. [r] Co. Litt. 8.

each other; and distinguishes it from the case of the sons of an alien, because in this case the blood was inheritable when imparted to them from the father; but he makes a doubt (upon the principles before mentioned, which are now over-ruled[s]) whether sons, born after the attainder, can inherit to each other, for they never had any inheritable blood in them.

Upon the whole it appears, that a person attainted is neither allowed to retain his former estate, nor to inherit any future one, nor to transmit any inheritance to his issue, either immediately from himself, or mediately through himself from any remoter ancestor; for his inheritable blood, which is necessary either to hold, to take, or to transmit any feodal property, is blotted out, corrupted, and extinguished for ever: the consequence of which is, that estates thus impeded in their descent, result back and escheat to the lord.

[256] This corruption of blood, thus arising from feodal principles, but perhaps extended farther then even those principles will warrant, has been long looked upon as a peculiar hardship: because the oppresive part of the feodal tenures being now in general abolished, it seems unreasonable to reserve one of their most inequitable consequences; namely, that the children should not only be reduced to present poverty (which, however severe, is sufficiently justified upon reasons of public policy), but also be laid under future difficulties of inheritance, on account of the guilt of their ancestors. And therefore in most (if not all) of the new felonies created by parliament since the reign of Henry the eighth, it is declared, that they shall not extend to any corruption of blood: and by the statue 7 Ann. c. 21. (the operation of which is postponed by the statute 17 Geo. II. c. 39.) it is enacted, that after the death of the late pretender, and his sons, no attainder for treason shall extend to the disinheriting any heir, nor the prejudice of any person, other than the offender himself: which provisions have indeed carried the remedy farther than was required by the hard-

[s] 1 Hal. P. C. 357.

ship above complained of; which is only the future obstruction of descents, where the pedigree happens to be deduced through the blood of an attainted ancestor. (8)

Before I conclude this head of escheat I must mention one singular instance in which lands held in fee-simple are not liable to escheat to the lord, even when their owner is no more, and hath left no heirs to inherit them. And this is the case of a corporation; for if that comes by any accident to be dissolved, the donor or his heirs shall have the land again in reversion, and not the lord by escheat: which is perhaps the only instance where a reversion can be expectant on a grant in fee-simple absolute. But the law, we are told [t], doth tacitly annex a condition to every such gift or grant, that if the corporation be dissolved, the donor or grantor shall re-enter; for the cause of the gift or grant [257] faileth. This is indeed founded upon the self-same principle as the law of escheat; the heirs of the donor being only substituted instead of the chief lord of the fee: which was formerly very frequently the case in subinfeudations, or alienations of lands by a vasal to be holden as of himself, till that practice was restrained by the statute of *quia emptores*, 18 Edw. I. st. 1., to which this very singular instance still in some degree remains an exception.

THERE is one more incapacity of taking by descent, which, not being productive of any escheat, is not strictly reducible to this head, and yet must not be passed over in silence. It is enacted by the statute 11 & 12 Will. III. c. 4. that every papist who shall not abjure the errors of his religion by taking the oaths to the government, and making the declaration against transubstantiation, within six months after he has attained the age of eighteen years, shall be incapable of inheriting, or taking by descent as well as purchase, any

[t] Co. Litt. 13.

(8) See vol. IV. p. 385. n. (5). If the statute of Anne had ever been allowed to take effect, it would have introduced a curious anomaly in the law, and placed the heir of one attainted of treason on a better footing than the heir of one attainted of a felony at common law, in whom the common law disabilities would have existed.

real estates whatsoever; and his next of kin, being a protestant, shall hold them to his own use till such time as he complies with the terms imposed by the act (9). This incapacity is merely personal; it affects himself only, and does not destroy the inheritable quality of his blood, so as to impede the descents to others of his kindred. In like manner as, even in the times of popery, one who entered into religion, and became a monk professed, was incapable of inheriting lands both in our own [u] and the feodal law; *eo quod desiit esse miles seculi qui factus est miles Christi: nec beneficium pertinet ad eum qui non debet gerere officium* [w]. But yet he was accounted only *civiliter mortuus*; he did not impede the descent to others, but the next heir was entitled to his or his ancestor's estate.

These are the several deficiencies of hereditary blood, recognized by the law of England; which, so often as they happen, occasion lands to escheat to the original proprietary or lord.

[u] Co. Litt. 132. [w] 2 *Feud.* 21.

(9) See Vol. IV. p. 58. n. 6.

CHAPTER THE SIXTEENTH.

OF TITLE BY OCCUPANCY.

OCCUPANCY is the taking possession of those things which before belonged to nobody. This, as we have seen[a], is the true ground and foundation of all property, or of holding those things in severalty, which by the law of nature, unqualified by that of society, were common to all mankind. But when once it was agreed that every thing capable of ownership should have an owner, natural reason suggested, that he who could first declare his intention of appropriating any thing to his own use, and, in consequence of such intention, actually took it into possession, should thereby gain the absolute property of it; according to that rule of the law of nations, recognized by the laws of Rome[b], *quod nullius est, id ratione naturali occupanti conceditur.*

THIS right of occupancy, so far as it concerns real property, (for of personal chattels I am not in this place to speak,) hath been confined by the laws of England within a very narrow compass; and was extended only to a single instance: namely, where a man was tenant *pur autre vie*, or had an estate granted to himself only (without mentioning his heirs) for the life of another man, and died during the life of *cestuy que vie*, or him by whose life it was holden; in this case he that could first enter on the land might lawfully retain the possession, so long as *cestuy qui vie* lived, by right of occupancy[c].

[a] See pag. 3 & 8.
[b] *Ff.* 41. 1. 3.
[c] Co. Litt. 41.

This seems to have been recurring to first principles, and calling in the law of nature to ascertain the property of the land when left without a legal owner. For it did not revert to the grantor, though it formerly[d] was supposed so to do; for he had parted with all his interest, so long as *cestuy que vie* lived: it did not escheat to the lord of the fee, for all escheats must be of the absolute entire fee, and not of any particular estate carved out of it: much less of so minute a remnant as this: it did not belong to the grantee; for he was dead: it did not descend to his heirs; for there were no words of inheritance in the grant: nor could it vest in his executors; for no executors could succeed to a freehold. Belonging, therefore, to nobody, like the *haereditas jacens* of the Romans, the law left it open to be seised and appropriated by the first person that could enter upon it, during the life of *cestuy que vie*, under the name of an occupant. But there was no right of occupancy allowed, where the king had the reversion of the lands: for the reversioner hath an equal right with any other man to enter upon the vacant possession, and where the king's title and a subject's concur, the king's shall be always preferred: against the king, therefore, there could be no prior occupant, because *nullum tempus occurrit regi*[e]. And, even in the case of a subject, had the estate *pur auter vie* been granted to a man *and his heirs* during the life of *cestuy que vie*, there the heir might, and still may, enter and hold possession, and is called in law a *special occupant*: as having a special exclusive right, by the terms of the original grant, to enter upon and occupy this *haereditas jacens*, during the residue of the estate granted: though some have thought him so called with no very great propriety[f]; and that such estate is rather a descendible freehold. But the title of common occupancy is now reduced almost nothing by two statutes: the one 29 Car. II. c. 3. which enacts (according to the antient rule of law[g]) that where there is no special occupant, in whom the estate may vest, the tenant *pur auter vie* may devise it by will,
[260] or it shall go to the executors or administrators, and be assets in their hand for payment of debts: the other that of 14 Geo. II. c. 20. which enacts, that the surplus of such estate *pur auter*

[d] Bract. *l.* 2. *c.* 9. *l.* 4. *tr.* 3. *c.* 9. § 4. Flet. *l.* 3. *c.* 12. § 6. *l.* 5. *c.* 5. § 15.
[e] Co. Litt. 41.
[f] Vaugh. 201.
[g] Bract. *ibid.* Flet. *ibid.*

vie, after payment of debts, shall go in a course of distribution like a chattel-interest.

By these two statutes the title of *common* occupancy is utterly extinct and abolished; though that of *special* occupancy by the heir at law continues to this day; such heir being held to succeed to the ancestor's estate, not by descent, for then he must take an estate of inheritance, but as an occupant specially marked out and appointed by the original grant. But, as before the statutes there could no common occupancy be had of incorporeal hereditaments, as of rents, tithes, advowsons, commons, or the like [g], (because, with respect to them, there could be no actual entry made, or corporal seisin had; and, therefore, by the death of the grantee *pur auter vie* a grant of such hereditaments was entirely determined,) so now, I apprehend, notwithstanding these statutes, such grant would be determined likewise; and the hereditaments would not be devisable, nor vest in the executors, nor go in a course of distribution. For these statutes must not be construed so as to create any new estate, or keep that alive which by the common law was determined, and thereby to defer the grantor's reversion; but merely to dispose of an interest in being, to which by law there was no owner, and which, therefore, was left open to the first occupant. When there is a residue left, the statutes give it to the executors and administrators, instead of the first occupant; but they will not *create* a residue, on purpose to give it to either [h]. They only meant to provide an appointed instead of a casual, a certain instead of an uncertain, owner of lands which before were nobody's; and thereby to supply this *casus omissus*, and render the disposition of law in all respects entirely uniform; this being the only instance wherein a title to a real estate could ever be acquired by occupancy. (1)

[g] Co. Litt. 41. Vaugh. 201.

[h] But see now the statute 5 Geo. III. c. 17. which makes leases for one, two, or three lives, by *ecclesiastical* persons or any *eleemosynary* corporation, of tithes or other incorporeal hereditaments, as good and effectual *to all intents and purposes* as leases of corporeal possessions.

(1) The contrary has been determined in the case of a rent, upon principles which apply equally to all other incorporeal hereditaments. And the decision seems reasonable, for by this construction of the statutes, no

This, I say, was the only instance; for I think there can be no other case devised, wherein there is not some owner of the land appointed by the law. In the case of a sole corporation, as a parson of a church, when he dies or resigns, though there is no *actual* owner of the land till a successor be appointed, yet there is a *legal, potential* ownership, subsisting in contemplation of law; and when the successor is appointed, his appointment shall have a retrospect and relation backwards, so as to entitle him to all the profits from the instant that the vacancy commenced. And, in all other instances, when the tenant dies intestate, and no other owner of the lands is to be found, in the common course of descents, there the law vests an ownership in the king, or in the subordinate lord of the fee, by escheat.

So also in some cases, where the laws of other nations give a right by occupancy, as in lands newly created, by the rising of an island in the sea or in a river, or by the alluvion or dereliction of the waters; in these instances the law of England assigns them an immediate owner. For Bracton tells us[i], that if an island arise in the *middle* of a *river*, it belongs in common to those who have lands on each side thereof; but if it be nearer to one bank than the other, it belongs only to him who is proprietor of the nearest shore: which is agreeable to, and probably copied from, the civil law[k]. Yet this seems only to be reasonable, where the soil of the river is

[i] *l.* 2. *c.* 2. [k] *Inst.* 2. 1. 22.

---

new estate is created, nor the grantor's reversion deferred beyond the original intention of the parties; the grantor parts with all his interest so long as *cestuy que vie* lives, equally in grants of incorporeal, as of corporeal hereditaments; and the grantee may, at common law, assign his interest in his life-time; the statutes, therefore, merely effectuate the intention of the grantor, and make more complete the interest of the grantee. *Rawlinson* v. *Duchess of Montague, per Lord Keeper Harcourt.* 3 P. Wms. 264. n. On the other hand, it has been determined that the statutes do not extend to copyholds, because their object being not to prejudice any existing right, but to dispose of that which had no owner at common law, they cannot be taken to apply to a case, where the lord retaining the freehold in his own hand had a right at common law, and where consequently the inconvenience of general occupancy never existed. *Zouch* v. *Force,* 7 East, 186.

equally divided between the owners of the opposite shores; for if the whole soil is the freehold of any one man, as it usually is whenever a several fishery is claimed [l], there it seems just (and so is the constant practice) that the eyotts or little islands, arising in any part of the river, shall be the property of him who owneth the piscary and the soil. However, in case a new island rise in the *sea*, though the civil law gives it to the first occupant [m], yet ours gives it to the king [n]. (2) And as to lands gained from the sea, either by *alluvion*, by [262] the washing up of sand and earth, so as in time to make *terra firma*; or by *dereliction*, as when the sea shrinks back below the usual water-mark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining [o]. For *de minimis non curat lex*: and, besides, these owners, being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is, therefore, a reciprocal consideration for such possible charge or loss. But if the alluvion or derelietion be sudden and considerable, in this case it belongs to the king; for, as the king is lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable he should have the soil, when the water has left it dry [p]. So that the quantity of ground gained, and the time during which it is gaining, are what make it either the king's or the subject's property. In the same manner if a river, running between two lordships, by degrees gains upon the one, and thereby leaves the other dry; the owner who loses his ground thus imperceptibly has no remedy: but if the course of the river be changed by a sudden and violent flood, or other hasty means, and thereby a man loses his ground, it is said that he shall have what the river has left in

[l] Salk. 637. See pag. 39.
[m] *Inst.* 2. 1. 22.
[n] Bract. *f.* 2. *c.* 2. Callis of sewers, 22.
[o] 2 Roll. Abr. 170. Dyer, 326.
[p] Callis, 24. 28.

(2) Bractoft, in the passage cited, gives it to the first occupant, not to the king, adopting the very words of the institutes. Callis's argument is, that the sea in property, possession, and profit, *tam in aqua quam in solo*, belongs to the king in the right of his crown, and, therefore, that the ground which was his when it was covered with waters, is his also when the waters have left it. Lect. 1. p. 44.

any other place, as a recompense for this sudden loss [q]. And this law of alluvions and derelictions, with regard to *rivers*, is nearly the same in the imperial law [r]; from whence, indeed, these our determinations seem to have been drawn and adopted: but we ourselves, as islanders, have applied them to *marine* increases; and have given our sovereign the prerogative he enjoys, as well upon the particular reasons before mentioned, as upon this other general ground of prerogative, which was formerly remarked [s], that whatever hath no other owner is vested by law in the king. (3)

[q] Callis, 28.
[r] *Inst.* 2. 1. 20, 21, 22, 23, 24.
[s] See Vol I. pag. 298.

(3) See the cases of *Blundell* v. *Catterall*, 5 B. & A. 268., and the *King* v. *Lord Yarborough*, 2 B. & C. 91.; in the first of which the general property in the sea shore, both as to its nature and in whom vested, was much considered; and the latter of which turned upon the doctrine of accretion by alluvion of the sea

Upon the general principle of first occupancy it is that, if A has appropriated to himself, and thereby acquired a right to a certain part of a stream for the use of his mill, and B subsequently builds a mill lower down, and occupies the remaining portion of the water, A cannot now divert any portion of that remainder from B: both rights are not only acquired by occupancy, but limited by it also *Bealey* v. *Shaw*, 6 East, 208.

CHAPTER THE SEVENTEENTH.

OF TITLE BY PRESCRIPTION.

A THIRD method of acquiring real property by purchase is that by *prescription*; as when a man can shew no other title to what he claims, than that he, and those under whom he claims, have immemorially used to enjoy it. Concerning customs, or immemorial usages, in general, with the several requisites and rules to be observed, in order to prove their existence and validity, we inquired at large in the preceding part of these commentaries [a]. At present, therefore, I shall only, first, distinguish between *custom*, strictly taken, and *prescription*; and then shew what sort of things may be prescribed for.

And, first, the distinction between custom and prescription is this; that custom is properly a *local* usage, and not annexed to any *person*; such as a custom in the manor of Dale that lands shall descend to the youngest son: prescription is merely a *personal* usage; as, that Sempronius and his ancestors, or those whose estate he hath, have used time out of mind to have such an advantage or privilege [b]. As for example; if there be a usage in the parish of Dale, that all the inhabitants of that parish may dance on a certain close, at all times, for their recreation (which is held [c] to be a lawful usage); this is strictly a custom, for it is applied to the *place* in general, and not to any particular *persons*: but if the tenant, who is seised [264] of the manor of Dale in fee, alleges that he and his ancestors, or all those whose estate he hath in the said manor, have

[a] See Vol. I. pag. 75, &c. [b] Co. Litt 113. [c] 1 Lev. 176.

used time out of mind to have common of pasture in such a close, this is properly called a prescription: for this is a usage annexed to the *person* of the owner of this estate. All prescription must be either in a man and his ancestors, or in a man and those whose estate he hath [d]: which last is called prescribing in a *que estate*. And formerly a man might, by the common law, have prescribed for a right which had been enjoyed by his ancestors or predecessors at any distance of time, though his or their enjoyment of it had been suspended [e] for an indefinite series of years. But by the statute of limitations, 32 Hen. VIII. c. 2. it is enacted, that no person shall make any prescription by the seisin or possession of his ancestor or predecessor, unless such seisin or possession hath been within threescore years next before such prescription made [f].

Secondly, as to the several species of things which may or may not, be prescribed for: we may, in the first place, observe, that nothing but incorporeal hereditaments can be claimed by prescription; as a right of way, a common, *&c.*; but that no prescription can give a title to lands, and other corporeal substances, of which more certain evidence may be had [g]. For a man shall not be said to prescribe, that he and his ancestors have immemorially used to hold the castle of Arundel: for this is clearly another sort of title; a title by corporal seisin and inheritance, which is more permanent, and therefore more capable of proof, than that of prescription. But, as to a right of way, a common, or the like, a man may be allowed to prescribe; for of these there is no corporal seisin, the enjoyment will be frequently by intervals, and

[d] 4 Rep. 32.

[e] Co. Litt. 113.

[f] This title, of prescription, was well known in the Roman law by the name of *usucapio*, (*Ff.* 41. 3. 3.) so called because a man, that gains a title by prescription, may be said *usu rem capere*. (1)

[g] Dr. & St. dial. 1. c. 8. Finch. 182.

(1) The *usucapio* of the Roman law in its objects seems to have differed from the prescription of the English law; for the rule is laid down Ff. xli. T. 3. 2., that corporeal hereditaments and not incorporeal, may be acquired by it. *Usu-capionem recipiunt maximè res corporales — incorporales, res traditionem, et usu capionem non recipere manifestum est.*

therefore the right to enjoy them can depend on nothing else but immemorial usage. 2. A prescription must always be laid in him that is tenant of the fee. A tenant for life, for [265] years, at will, or a copyholder, cannot prescribe, by reason of the imbecility of their estates [h]. For, as prescription is usage beyond time of memory, it is absurd that they should pretend to prescribe for any thing, whose estates commenced within the remembrance of man. And therefore the copyholder must prescribe under cover of his lord's estate, and the tenant for life under cover of the tenant in fee-simple. As if tenant for life of a manor would prescribe for a right of common as appurtenant to the same, he must prescribe under cover of the tenant in fee-simple: and must plead that John Stiles and his ancestors had immemorially used to have this right of common, appurtenant to the said manor, and that John Stiles demised the said manor, with its appurtenances, to him the said tenant for life. 3. A prescription cannot be for a thing which cannot be raised by grant. For the law allows prescription only in supply of the loss of a grant, and therefore every prescription presupposes a grant to have existed. Thus the lord of a manor cannot prescribe to raise a tax or toll upon strangers; for, as such claim could never have been good by any grant, it shall not be good by prescription [i]. 4. A fourth rule is, that what is to arise by matter of record cannot be prescribed for, but must be claimed by grant, entered on record; such as, for instance, the royal franchises of deodands, felons' goods, and the like. These, not being forfeited till the matter on which they arise is found by the inquisition of a jury, and so made a matter of record, the forfeiture itself cannot be claimed by an inferior title. But the franchises of treasure-trove, waifs, estrays, and the like, may be claimed by prescription; for they arise from private contingencies, and not from any matter of record [k]. (2) 5.

[h] 4 Rep. 31, 32. [i] 1 Vent. 387. [k] Co. Litt. 114.

(2) The reason for this distinction is not very satisfactory; though the forfeiture must be matter of record, there seems no ground why the right to receive that forfeiture might not be claimed by prescription: at all events there is some inconsistency, for a man may prescribe for a court leet which is a court of record, as well as for a county palatine, and by reason thereof to have the forfeitures in question. Co. Litt. 114. b.

Among things incorporeal, which may be claimed by prescription, a distinction must be made with regard to the manner of prescribing; that is, whether a man shall prescribe in a *que estate*, or in himself and his ancestors. For, if a man prescribes in a *que estate*, (that is, in himself and those whose
[266] estate he holds,) nothing is claimable by this prescription, but such things as are incident, appendant, or appurtenant to lands; for it would be absurd to claim any thing as the consequence, or appendix of an estate, with which the thing claimed has no connexion; but, if he prescribes in himself and his ancestors, he may prescribe for any thing whatsoever that lies in grant; not only things that are appurtenant, but also such as may be in gross[1]. Therefore a man may prescribe, that he, and those whose estate he hath in the manor of Dale have used to hold the advowson of Dale, as *appendant* to that manor; but, if the advowson be a distinct inheritance, and not appendant, then he can only prescribe in his ancestors. So also a man may prescribe in a *que estate* for a common *appurtenant* to a manor; but if he would prescribe for a common *in gross*, he must prescribe in himself and his ancestors. 6. Lastly, we may observe, that estates gained by prescription, are not, of course, descendible to the heirs general, like other purchased estates, but are an exception to the rule. For, properly speaking, the prescription is rather to be considered as an evidence of a former acquisition, than as an acquisition *de novo*: and therefore, if a man prescribes for a right of way in himself and his ancestors, it will descend only to the blood of that line of ancestors in whom he so prescribes; the prescription in this case being indeed a species of descent. But, if he prescribes for it in a *que estate*, it will follow the nature of that estate in which the prescription is laid, and be inheritable in the same manner, whether that were acquired by descent or purchase; for every accessory followeth the nature of it's principal.

[1] Litt. § 183. Finch. L. 104.

CHAPTER THE EIGHTEENTH.

OF TITLE BY FORFEITURE.

FORFEITURE is a punishment annexed by law to some illegal act, or negligence, in the owner of lands, tenements, or hereditaments: whereby he loses all his interest therein, and they go to the party injured, as a recompense for the wrong which either he alone, or the public together with himself, hath sustained.

LANDS, tenements, and hereditaments may be forfeited in various degrees, and by various means: 1. By crimes and misdemesnors. 2. By alienation contrary to law. 3. By non-presentation to a benefice, when the forfeiture is denominated a *lapse*. 4. By simony. 5. By non-performance of conditions. 6. By waste. 7. By breach of copyhold customs. 8. By bankruptcy.

I. THE foundation and justice of forfeitures for *crimes and misdemesnors*, and the several degrees of those forfeitures proportioned to the several offences, have been hinted at in the preceding volume [a]; but it will be more properly considered, and more at large, in the fourth book of these commentaries. At present I shall only observe in general, that the offences which induce a forfeiture of lands and tenements to the crown are principally the following six: 1. Treason. 2. Felony. 3. Misprision of treason. 4. *Praemunire*. 5. Drawing a weapon on a judge, or striking any one in the presence of [268] the king's principal courts of justice. 6. Popish recusancy, or non-observance of certain laws enacted in restraint of pa-

[a] Vol. I. pag. 299.

pists. But at what time they severally commence, how far they extend, and how long they endure, will with greater propriety be reserved as the object of our future inquiries.

II. Lands and tenements may be forfeited by *alienation*, or conveying them to another, contrary to law. This is either alienation in *mortmain*, alienation to an *alien*, or alienation by *particular tenants*; in the two former of which cases the forfeiture arises from the incapacity of the alienee to take, in the latter from the incapacity of the alienor to grant.

1. Alienation in *mortmain*, *in mortua manu*, is an alienation of lands or tenements to any corporation, sole or aggregate, ecclesiastical or temporal. But these purchases having been chiefly made by religious houses, in consequence whereof the lands became perpetually inherent in one dead hand, this hath occasioned the general appellation of mortmain to be applied to such alienations [b], and the religious houses themselves to be principally considered in forming the statutes of mortmain; in deducing the history of which statutes, it will be matter of curiosity to observe the great address and subtle contrivance of the ecclesiastics in eluding from time to time the laws in being, and the zeal with which successive parliaments have pursued them through all their finesses: how new remedies were still the parents of new evasions: till the legislature at last, though with difficulty, hath obtained a decisive victory.

By the common law any man might dispose of his lands to any other private man at his own discretion, especially when the feodal restraints of alienation were worn away. Yet in consequence of these it was always, and is still, necessary [c], for corporations to have a licence in mortmain from the crown, to enable them to purchase lands; for as
[269] the king is the ultimate lord of every fee, he ought not, unless by his own consent, to lose his privilege of escheats, and other feodal profits, by the vesting of lands in tenants that can never be attainted or die. And such licences of mortmain seem to have been necessary among the Saxons, above sixty

[b] See Vol. I. pag. 479. [c] F. N. B. 221.

years before the Norman conquest [d]. But, besides this general licence from the king, as lord paramount of the kingdom, it was also requisite, whenever there was a mesne or intermediate lord between the king and the alienor, to obtain his licence also, (upon the same feodal principles,) for the alienation of the specific land. And if no such licence was obtained, the king or other lord might respectively enter on the land so aliened in mortmain as a forfeiture. The necessity of this licence from the crown was acknowledged by the constitutions of Clarendon [e], in respect of advowsons, which the monks always greatly coveted, as being the groundwork of subsequent appropriations [f]. Yet such were the influence and ingenuity of the clergy, that (notwithstanding this fundamental principle) we find that the largest and most considerable dotations of religious houses happened within less than two centuries after the conquest. And (when a licence could not be obtained) their contrivance seems to have been this: that, as the forfeiture for such alienations accrued in the first place to the immediate lord of the fee, the tenant who meant to alienate first conveyed his lands to the religious house, and instantly took them back again to hold as tenant to the monastery; which kind of instantaneous seisin was probably held not to occasion any forfeiture: and then, by pretext of some other forfeiture, surrender, or escheat, the society entered into those lands in right of such their newly-acquired signiory, as immediate lords of the fee. But, when these dotations began to grow numerous, it was observed that the feodal services, ordained for the defence of the kingdom, were every day visibly withdrawn; that the circulation of landed property from man to man began to stagnate; and that the lords were curtailed of the fruits of [270] their signiories, their escheats, wardships, reliefs, and the like; and therefore, in order to prevent this, it was ordered by the second of King Henry III.'s great charters [g], and afterwards by that printed in our common statute-books, that all such attempts should be void, and the land forfeited to the lord of the fee [h].

[d] Selden, Jan. Angl. l. 2. § 45.

[e] *Ecclesiae de feudo domini regis non possunt in perpetuum dari, absque assensu et consensione ipsius*, c. 2. *A. D.* 1164.

[f] See Vol. I. p. 384.

[g] *A. D.* 1217. *cap.* 43. *edit. Oxon.*

[h] *Non licet alicui de caetero dare terram suam alicui domui religiosae, ita quod illam resumat tenendam de eadem*

But, as this prohibition extended only to religious *houses*, bishops and other sole corporations were not included therein; and the aggregate ecclesiastical bodies, (who, sir Edward Coke observes[1], in this were to be commended, that they ever had of their counsel the best learned men that they could get,) found many means to creep out of this statute, by buying in lands that were *bonâ fide* holden of themselves as lords of the fee, and thereby evading the forfeiture; or by taking long leases for years, which first introduced those extensive terms, for a thousand or more years, which are now so frequent in conveyances. This produced the statute *de religiosis*, 7 Edw. I.; which provided, that *no person*, religious or other whatsoever, should buy, or sell, or receive under pretence of a gift, or term of years, or any other title whatsoever, nor should by any art or ingenuity appropriate to himself, any lands or tenements in mortmain: upon pain that the immediate lord of the fee, or, on his default for one year, the lords paramount, and, in default of all of them, the king, might enter thereon as a forfeiture.

This seemed to be a sufficient security against all alienations in mortmain: but as these statutes extended only to gifts and conveyances between the parties, the religious houses now began to set up a fictitious title to the land, which it was intended they should have, and to bring an action to recover
[271] it against the tenant; who, by fraud and collusion, made no defence, and thereby judgment was given for the religious house, which then *recovered* the land by sentence of law upon a supposed prior title. And thus they had the honour of inventing those fictitious adjudications of right, which are since become the great assurance of the kingdom, under the name of *common recoveries*. But upon this the statute of Westminster the second, 13 Edw. I. c. 32. enacted, that in such cases a jury shall try the true right of the demandants or plaintiffs to the land, and if the religious house or corporation be found to have it, they shall still recover seisin; otherwise it shall be forfeited to the immediate lord of the

domo; nec licent alicui domui religiosae terram alicujus sic accipere, quod tradat illum ei a quo ipsam recepit tenendam: si quis autem de caetero terram suam domui religiosae sic dederit, et super hoc conuncatur, donum suum penitus cassetur, et terra illa domino suo illius feodi incurratur. Mag. Cart. 9 Hen. III. c 36.

[1] 2 Inst. 75.

fee, or else to the next lord, and finally to the king, upon the immediate or other lord's default. And the like provision was made by the succeeding chapter[k], in case the tenants set up crosses upon their lands (the badges of knights templars and hospitallers,) in order to protect them from the feodal demands of their lords, by virtue of the privileges of those religious and military orders. So careful indeed was this provident prince to prevent any future evasions, that when the statute of *quia emptores*, 18 Edw. I., abolished all subinfeudations, and gave liberty for all men to alienate their lands to be holden of their next immediate lord[l], a proviso was inserted[m] that this should not extend to authorize any kind of alienation in mortmain. And when afterwards the method of obtaining the king's licence by writ of *ad quod damnum* was marked out, by the statute 27 Edw. I. st. 2., it was farther provided by statute 34 Edw. I. st. 3. that no such licence should be effectual, without the consent of the mesne or intermediate lords.

YET still it was found difficult to set bounds to ecclesiastical ingenuity; for when they were driven out of all their former holds, they devised a new method of conveyance, by which the lands were granted, not to themselves directly, but to nominal feoffees *to the use of* the religious houses; thus distinguishing between the *possession* and the *use*, and receiving the actual profits, while the seisin of the land remained in the [272] nominal feoffee; who was held by the courts of equity (then under the direction of the clergy) to be bound in conscience to account to his *cestuy que use* for the rents and emoluments of the estate. And it is to these inventions that our practisers are indebted for the introduction of uses and trusts, the foundation of modern conveyancing. But, unfortunately for the inventors themselves, they did not long enjoy the advantage of their new device; for the statute 15 Ric. II. c. 5. enacts, that the lands which had been so purchased to uses should be amortised by licence from the crown, or else be sold to private persons (1); and that, for the future, uses shall be subject to

[k] *cap.* 33. [l] 2 Inst. 501. [m] *cap.* 3.

(1) To amortise is to alien in mortmain; the statute, therefore, considering these feoffments to uses as evasions of the former laws, is so far retrospective

the statutes of mortmain, and forfeitable like the lands themselves. And whereas the statutes had been eluded by purchasing large tracts of land, adjoining to churches, and consecrating them by the name of church-yards, such subtile imagination is also declared to be within the compass of the statutes of mortmain. And civil or lay corporations, as well as ecclesiastical, are also declared to be within the mischief, and of course within the remedy provided by those salutary laws. And, lastly, as during the times of popery, lands were frequently given to superstitious uses, though not to any corporate bodies; or were made liable in the hands of heirs and devisees to the charge of obits, chaunteries, and the like, which were equally pernicious in a well-governed estate as actual alienations in mortmain; therefore, at the dawn of the reformation, the statute 23 Hen. VIII. c. 10. declares, that all future grants of lands for any of the purposes aforesaid, if granted for any longer term than twenty years, shall be void.

But, during all this time, it was in the power of the crown, by granting a licence of mortmain, to remit the forfeiture, so far as related to it's own rights; and to enable any spiritual or other corporation to purchase and hold any lands or tenements in perpetuity; which prerogative is declared and confirmed by the statute 18 Edw. III. st. 3. c. 3. But, as doubts were conceived at the time of the revolution how far such licence was valid [n], since the kings had no power to
[273] dispense with the statutes of mortmain by a clause of *non obstante* [o], which was the usual course, though it seems to have been unnecessary [p]: and as, by the gradual declension of mesne signiories through the long operation of the statute of *quia emptores*, the rights of intermediate lords were reduced to a very small compass; it was therefore provided by the statute 7 & 8 W. III. c. 37. that the crown for the future at

[n] 2 Hawk. P. C. c. 37. § 30.
[o] Stat. 1 W. & M. st. 2. c. 2.
[p] Co. Litt. 99.

retrospective as to compel the feoffees to purchase licences in order to legalize them, or to alienate the estates to private persons, by which they would cease to be in mortmain.

it's own discretion may grant licences to aliene or take in mortmain, of whomsoever the tenements may be holden. (2)

After the dissolution of monasteries under Henry VIII, though the policy of the next popish successor affected to grant a security to the possessors of abbey lands, yet, in order to regain so much of them as either the zeal or timidity of their owners might induce them to part with, the statutes of mortmain were suspended for twenty years by the statute 1 & 2 P. & M. c.8., and during that time, any lands or tenements were allowed to be granted to any spiritual corporation without any licence whatsoever. And, long afterwards, for a much better purpose, the augmentation of poor livings, it was enacted by the statute 17 Car. II. c.3., that appropriators may annex the great tithes to the vicarages; and that all benefices under 100*l.* *per annum* may be augmented by the purchase of lands, without licence of mortmain in either case; and the like provision hath been since made, in favour of the governors of queen Anne's bounty [q]. It hath also been held [r], that the statute 23 Hen. VIII. before mentioned did not extend to any thing but *superstitious* uses; and that therefore a man may give lands for the maintenance of a school, an hospital, or any other *charitable* uses. But as it was apprehended from recent experience, that persons on their death-beds might make large and improvident dispositions even for these good purposes, and defeat the political ends of the statutes of mortmain; it is therefore enacted by the statute 9 Geo. II. c.36. that no lands or tenements, or money to be laid out thereon, shall be given for or charged with any *charitable* uses whatsoever, unless by deed indented, [274] executed in the presence of two witnesses twelve calendar

[q] Stat. 2 & 3 Ann. c. 11. [r] 1 Rep. 24.

(2) It is to be observed, that the effect of the king's licence under the statute of William is more extensive than it was at common law, or under the statutes of mortmain; before that statute it extended only to remit the king's own claim to a forfeiture as chief lord, and, strictly speaking, was ineffectual, unless preceded by an inquiry under a writ of *ad quod damnum*; since that statute it saves from all forfeiture as well as to the mesne lords as the king, and the writ of *ad quod damnum* seems no longer necessary.

months before the death of the donor, and enrolled in the court of chancery within six months after it's execution, (except stocks in the public funds, which may be transferred within six months previous to the donor's death,) and unless such gift be made to take effect immediately, and be without power of revocation: and that all other gifts shall be void. The two universities, their colleges, and the scholars upon the foundation of the colleges of Eton, Winchester, and Westminster, are excepted out of this act: but such exemption was granted with this proviso, that no college shall be at liberty to purchase more advowsons, than are equal in number to one moiety of the fellows or students, upon the respective foundations. (3)

2. Secondly, alienation *to an alien* is also a cause of forfeiture to the crown of the land so alienated; not only on account of his incapacity to hold them, which occasions him to be passed by in descents of land [s]. but likewise on account of his presumption in attempting, by an act of his own, to acquire any real property; as was observed in the preceding volume [t].

3. Lastly, alienations *by particular tenants*, when they are greater than the law entitles them to make, and devest the remainder or reversion [u], are also forfeitures to him whose right is attacked thereby. As, if tenant for his own life alienes by feoffment or fine for the life of another, or in tail

[s] See pag. 249, 250. [t] Book I. pag. 372. [u] Co. Litt. 251.

(3) This statute had the effect of making void many devises and bequests in favour of the governors of Queen Anne's bounty; this was remedied by the 45 G. 3. c. 107. s. 1., which in substance exempted grants made under the 2d & 3d of Anne, c. 11. from its operation. Two years after, an act was passed 45 G. 3. c. 101. which repealed the restriction imposed by this act on colleges as to the number of their advowsons, so that now they may hold them without limitation. I believe it, however, to be understood that neither the statute 9 G. 2., or the 45 Geo. 3., at all affected the old restraints of the mortmain laws, and that a licence from the crown is still necessary when a college purchases an advowson. Many colleges are provided with a prospective licence to purchase in mortmain to a certain extent; and such a licence has in practice been considered sufficient.

or in fee; these being estates, which either must or may last longer than his own, the creating them is not only beyond his power, and inconsistent with the nature of his interest, but is also a forfeiture of his own particular estate to him in remainder or reversion [u]. For which there seem to be two reasons. First, because such alienation amounts to a renunciation of the feodal connexion and dependence; it implies a refusal to perform the due renders and services to the lord of the fee, of which fealty is constantly one: and it tends in it's [275] consequence to defeat and devest the remainder or reversion expectant: as therefore that is put in jeopardy by such act of the particular tenant, it is but just that, upon discovery, the particular estate should be forfeited and taken from him, who has shewn so manifest an inclination to make an improper use of it. The other reason is, because the particular tenant, by granting a larger estate than his own, has by his own act determined and put an entire end to his own original interest; and on such determination the next taker is entitled to enter regularly, as in his remainder or reversion. The same law which is thus laid down with regard to tenants for life, holds also with respect to all tenants of the mere freehold or of chattel interests; but if tenant in tail alienes in fee, this is no immediate forfeiture to the remainder-man, but a mere *discontinuance* (as it is called [w]) of the estate tail, which the issue may afterwards avoid by due course of law [x]: for he in remainder or reversion hath only a very remote and barely possible interest therein, until the issue in tail is extinct. But, in case of such forfeitures by particular tenants, all legal estates by them before created, as if tenant for twenty years grants a lease for fifteen, and all charges by him lawfully made on the lands, shall be good and available in law [y]. For the law will not hurt an innocent lessee for the fault of his lessor; nor permit the lessor, after he has granted a good and lawful estate, by his own act to avoid it, and defeat the interest which he himself has created.

Equivalent, both in it's nature and it's consequences, to an illegal alienation by the particular tenant, is the civil

[u] Litt. § 415.
[w] See book III. ch. 10.
[x] Litt. § 595, 6, 7.
[y] Co. Litt. 233.

crime of *disclaimer*; as where a tenant, who holds of any lord, neglects to render him the due services and, upon an action brought to recover them, disclaims to hold of his lord. Which disclaimer of tenure in any court of record is a forfeiture of the lands to the lord[z], upon reasons most apparently feodal. And so likewise, if in any court of record the particular tenant does any act which amounts to a virtual disclaimer; if he claims any greater estate than was granted him at the first infeodation, or takes upon himself those rights which belong only to tenant of a superior class[a]; if he affirms the reversion to be in a stranger, by accepting his fine, attorning as his tenant, collusive pleading, and the like[b]; such behaviour amounts to a forfeiture of his particular estate.

[276]

III. Lapse is a species of forfeiture, whereby the right of presentation to a church accrues to the ordinary by neglect of the patron to present, to the metropolitan by neglect of the ordinary, and to the king by neglect of the metropolitan. For it being for the interest of religion, and the good of the public, that the church should be provided with an officiating minister, the law has therefore given this right of lapse, in order to quicken the patron; who might otherwise, by suffering the church to remain vacant, avoid paying his ecclesiastical dues, and frustrate the pious intentions of his ancestors. This right of lapse was first established about the time (though not by the authority[c]) of the council of Lateran[d], which was in the reign of our Henry the second, when the bishops first began to exercise universally the right of institution to churches[e]. And therefore, where there is no right of institution, there is no right of lapse: so that no donative can lapse to the ordinary[f], unless it hath been augmented by the queen's bounty[g]. But no right of lapse can accrue, when the original presentation is in the crown[h].

The term, in which the title to present by lapse accrues from the one to the other successively is six *calendar* months[i],

[z] Finch, 270, 271.
[a] Co. Litt. 251.
[b] *Ibid.* 252.
[c] 2 Roll. Abr. 363. pl. 10.
[d] Bracton, *l.* 4. *tr.* 2. *c.* 3.
[e] See pag. 23.
[f] Bro. *Abr. tit. Quar. Imped.* Cro. Jac. 518.
[g] St. 1 Geo. I. st. 2. c. 10.
[h] Stat. 17 Edw. II. c. 8. 2 Inst. 273.
[i] 6 Rep. 62. Regist. 42.

(following in this case the computation of the church, and not the usual one of the common law,) and this exclusive of the day of the avoidance[k]. But, if the bishop be both patron and ordinary, he shall not have a double time allowed him to collate in[l]; for the forfeiture accrues by law, whenever the negligence has continued six months in the same person. And also if the bishop doth not collate his own clerk immediately to the living, and the patron presents, though after the six months are elapsed, yet his presentation is good, and the bishop is bound to institute the patron's clerk[m]. For as the law only gives the bishop this title by lapse, to punish the patron's negligence, there is no reason that, if the bishop himself be guilty of equal or greater negligence, the patron should be deprived of his turn. If the bishop suffer the presentation to lapse to the metropolitan, the patron also has the same advantage if he presents before the archbishop has filled up the benefice; and that for the same reason. Yet the ordinary cannot, after lapse to the metropolitan, collate his own clerk to the prejudice of the archbishop[n]. For he had no permanent right and interest in the advowson, as the patron hath, but merely a temporary one; which having neglected to make use of during the time, he cannot afterwards retrieve it. But if the presentation lapses to the king, prerogative here intervenes and makes a difference; and the patron shall never recover his right till the king has satisfied his turn by presentation: for *nullum tempus occurrit regi*[o]. And therefore it may seem, as if the church might continue void for ever, unless the king shall be pleased to present; and a patron thereby be absolutely defeated of his advowson. But to prevent this inconvenience, the law has lodged a power in the patron's hands, of as it were compelling the king to present. For if, during the delay of the crown, the patron himself presents, and his clerk is instituted, the king indeed by presenting another may turn out the patron's clerk; or, after induction, may remove him by *quare impedit*; but if he does not, and the patron's clerk dies incumbent, or is canonically deprived, the king hath lost his right, which was only to the next or first presentation[p]. [277]

[k] 2 Inst. 361.
[l] Gibs. Cod. 769.
[m] 2 Inst. 273.
[n] 2 Roll. Abr. 368.
[o] Dr. & St. d. 2. c. 36. Cro. Car. 355.
[p] 7 Rep. 28. Cro. Eliz. 44.

In case the benefice becomes void by death, or cession through plurality of benefices, there the patron is bound to take notice of the vacancy at his own peril; for these are matters of equal notoriety to the patron and ordinary: but in case of a vacancy by resignation, or canonical deprivation, or if a clerk presented be refused for insufficiency, these being matters of which the bishop alone is presumed to be cognizant, here the law requires him to give notice thereof to the patron, otherwise he can take no advantage by way of lapse[q]. Neither shall any lapse thereby accrue to the metropolitan or to the king; for it is universally true, that neither the archbishop or the king shall ever present by lapse, but where the immediate ordinary might have collated by lapse, within the six months, and hath exceeded his time: for the first step or beginning faileth, *et quod non habet principium, non habet finem*[r]. If the bishop refuse or neglect to examine and admit the patron's clerk, without good reason assigned or notice given, he is styled a disturber by the law, and shall not have any title to present by lapse; for no man shall take advantage of his own wrong[s]. Also if the right of presentation be litigious or contested, and an action be brought against the bishop to try the title, no lapse shall incur till the question of right be decided[t].

IV. By *simony*, the right of presentation to a living is forfeited, and vested *pro hac vice* in the crown. Simony is the corrupt presentation of any one to an ecclesiastical benefice for money, gift, or reward. It is so called from the resemblance it is said to bear to the sin of Simon Magus, though the purchasing of holy orders seems to approach nearer to his offence. It was by the canon law a very grievous crime: and is so much the more odious, because, as sir Edward Coke observes[u], it is ever accompanied with perjury; for the presentee is sworn to have committed no simony. However, it was not an offence punishable in a criminal way at the common law[w]; it being thought sufficient to leave the clerk to ecclesiastical censures. But as these did not affect
[279] the simoniacal patron, nor were efficacious enough to repel

[q] 4 Rep 75. 2 Inst. 632.
[r] Co. Litt. 344, 345.
[s] 2 Roll. Abr. 369.
[t] Co. Litt. 344.
[u] 3 Inst. 156.
[w] Moor. 564.

the notorious practice of the thing, divers acts of parliament have been made to restrain it by means of civil forfeitures; which the modern prevailing usage, with regard to spiritual preferments, calls aloud to be put in execution. I shall briefly consider them in this place, because they devest the corrupt patron of the right of presentation, and vest a new right in the crown.

By the statute 31 Eliz. c. 6. it is for avoiding of simony enacted, that if any patron (4), for any corrupt consideration, by gift or promise directly or indirectly, shall present or collate any person to an ecclesiastical benefice or dignity; such presentation shall be void, and the presentee be rendered incapable of ever enjoying the same benefice: and the crown shall present to it for that turn only [x]. But if the presentee dies, without being convicted of such simony in his lifetime, it is enacted by stat. 1 W. & M. c. 16. that the simoniacal contract shall not prejudice any other innocent patron [or presentee], on pretence of lapse to the crown or otherwise. Also by the statute 12 Ann. stat. 2. c. 12. if any person for money or profit shall procure, in his own name or the name of any other, the next presentation to any living ecclesiastical, and shall be presented thereupon, this is declared to be a simoniacal contract; and the party is subjected to all the ecclesiastical penalties of simony, is disabled from holding the benefice, and the presentation devolves to the crown.

Upon these statutes many questions have arisen, with regard to what is, and what is, not simony. And, among others, these points seem to be clearly settled: 1. That to purchase a presentation, the living being actually vacant, is open and notorious simony [y]: this being expressly in the face of the statute (5). 2. That for a clerk to bargain for the next

[x] For other penalties inflicted by this statute, see book IV. ch. 4.

[y] Cro. Eliz. 788. Moor. 914.

(4) The words of the statute are, if any "person or persons," and they extend not merely to rightful patrons, but to strangers who present by usurpation Although, however, such a presentation by a stranger would be void, yet the crown would not gain the turn, but the rightful patron would be entitled to present. Co. Litt. 120.

(5) The incumbent of a living being exceedingly ill and on his death bed,

presentation, the incumbent being sick and about to die, was simony, even before the statute of queen Anne [z]: and now, by that statute, to purchase, either in his own name or another's, the next presentation, and be thereupon presented
[280] at any future time to the living, is direct and palpable simony. But, 3. It is held that for a father to purchase such a presentation, in order to provide for his son, is not simony: for the son is not concerned in the bargain, and the father is by nature bound to make a provision for him [a]. 4. That if a simoniacal contract be made with the patron, the clerk not being privy thereto, the presentation for that turn shall indeed devolve to the crown, as a punishment of the guilty patron; but the clerk, who is innocent, does not incur any disability or forfeiture [b]. 5. That bonds given to pay money to charitable uses, on receiving a presentation to a living, are not simoniacal [c], provided the patron or his relations be not benefited thereby [d]; for this is no corrupt consideration, moving to the patron. 6. That bonds of resignation, in case of non-residence or taking any other living, are not simoniacal [e]; there being no corrupt consideration herein, but such

[z] Hob. 165.
[a] Cro. Eliz. 686. Moor. 916.
[b] 3 Inst. 154. Cro. Jac. 385. 12 Co. 101. Cro. Eliz. 790.
[c] Noy, 142.
[d] Stra. 534.
[e] Cro. Car. 180.

---

bed, the life owner of the advowson and the plaintiff, knowing of his condition, and believing that his death was at hand, agreed for the sale of the next presentation, and in order to carry the agreement into effect executed a deed on the same day a few hours before his death, which purported to convey the advowson for 99 years to the plaintiff and his executors, if the patron should so long live; but there was a proviso for a re-conveyance to the patron as soon as one presentation should have been made. At the time of the execution of the deed, it did not appear that the plaintiff had any particular clerk in view to present, and he in fact presented a clerk who was in no respect privy to the transaction.

Upon these facts the court of K. B. held, that this was in substance a corrupt bargain for money with the patron, that he by means of a conveyance to the plaintiff, and thereby in his name, should present a clerk to a benefice which, in fact, and also according to the parties own consideration, was full in name only, but void in reality. That actual vacancy was not essentially necessary to make the contract corrupt and void; and that the innocence of the clerk, or the want of specification of an individual presentee at the time of making the contract, were immaterial circumstances in construing the nature of the contract. *Fox* v. *Bp. of Chester*, 2 B & C. 635.

only as is for the good of the public. So also bonds to resign, when the patron's son comes to canonical age, are legal; upon the reason before given, that the father is bound to provide for his son[f]. 7. Lastly, general bonds to resign at the patron's request are held to be legal[g]: for they may possibly be given for one of the legal considerations before mentioned; and where there is a possibility that a transaction may be fair, the law will not suppose it iniquitous without proof. (6) But, if the party can prove the contract to have been a corrupt one, such proof will be admitted, in order to shew the bond simoniacal, and therefore void. Neither will the patron be suffered to make an ill use of such a general bond of resignation; as, by extorting a composition for tithes, [281] procuring an annuity for his relation, or by demanding a resignation wantonly or without good cause, such as is approved by the law; as, for the benefit of his own son, or on account of non-residence, plurality of livings, or gross immorality in the incumbent[h].

V. The next kind of forfeitures are those by *breach* or non-performance of a *condition* annexed to the estate, either

[f] Cro. Jac. 248. 274.
[g] Cro. Car. 180. Stra. 227.
[h] 1 Vern. 411. 1 Equ. Cas. Abr. 86, 87. Stra. 534.

(6) In the case of *Ffytche* v. *The Bishop of London*, (May 1785,) the house of lords determined that a general bond to resign at the patron's request was illegal, reversing thereby the concurrent decisions of the courts of common pleas and king's bench. Lord Thurlow, Ch. moved and spoke for the reversal, but the majority of the judges had delivered opinions in favour of the judgments below; and there has been a strong inclination since to confine the authority of the case to those only which are precisely similar in their circumstances. Therefore in *Bagshaw* v. *Bossley*, 4 T. R. 78., the court of K. B. affirmed the legality of a bond which was conditioned for a resignation within a certain time after notice in case of non-residence, or suffering dilapidations; and they gave the same judgment in *Partridge* v. *Whiston*, 4 T. R. 359. where the condition was to resign in favour of a specified son of the patron on three months' notice, and to keep the parsonage and chancel in good repair. In this case there was no argument, it being understood that there would certainly be an appeal to the lords, which however was not made. And it seems to have been thought since, that a bond was legal conditioned to resign in favour of a specified person. See *Newman* v *Newman*, 4 M. & S. 71. Such bonds, I believe, are now in common use. See *Lord Sondes* v. *Fletcher*, 5 B. & A. 835.

expressly by deed at it's original creation, or impliedly by law from a principle of natural reason. Both which we considered at large in a former chapter [i].

VI. I THEREFORE now proceed to another species of forfeiture, *viz.* by *waste*. Waste, *vastum*, is a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him that hath the remainder or reversion in fee-simple or fee-tail [k]. (7)

WASTE is either *voluntary*, which is a crime of commission, as by pulling down a house; or it is *permissive*, which is a matter of omission only, as by suffering it to fall for want of necessary reparations. Whatever does a lasting damage to the freehold or inheritance is waste. [l] Therefore removing wainscots, floors, or other things once fixed to the freehold of a house, is waste [m]. (8) If a house be destroyed by tempest, lightning, or the like, which is the act of Providence, it is no waste: but otherwise, if the house be burnt by the carelessness or negligence of the lessee; though now by the statute 6 Ann. c.31. no action will lie against a tenant

[i] See ch. 10. page 152.
[k] Co. Litt. 53.
[l] Hetl. 85.
[m] 4 Rep. 64.

(7) See Vol. III. p. 225. n. (1).

(8) In the case of *Elwes* v. *Maw*, 3 East, 38., the question of fixtures removeable and irremoveable was very fully and luminously discussed, and the judgment there pronounced by Lord Ellenborough has ever since been considered to lay down the law on the subject. Disputes upon this subject will principally arise between the heir and executor of a tenant in fee-simple, between the executor of a tenant for life or in tail, and the reversioner or remainder man, and between landlord and tenant. In the first case the law always leans in favour of the heir, and against the disfiguring or injuring of the inheritance, and therefore as between these two, many personal chattels, annexed to the freehold, are irremoveable, which in other cases would not be so. In the second case, the executors are more favoured; but the third is that in which the greatest indulgence is shown to the particular tenant, especially where the fixture has been erected in advancement of the tenant's trade. Thus engines, vats, furnaces, &c. have been allowed to be removed, when fixed to the freehold for the purposes of trade or manufacture; though it is held waste to remove hearths and chimney-pieces, or buildings subservient only to the purposes of agriculture.

for an accident of this kind. (9) Waste may also be committed in ponds, dove-houses, warrens, and the like; by so reducing the number of the creatures therein, that there will not be sufficient for the reversioner when he comes to the inheritance [n]. Timber also is part of the inheritance [o]. Such are oak, ash, and elm in all places; and in some particular countries, by local custom, where other trees are generally used for building, they are for that reason considered as timber; and to cut down such trees, or top them, or do [282] any other act whereby the timber may decay, is waste [p]. But underwood the tenant may cut down at any seasonable time that he pleases [q]; and may take sufficient estovers of common right for house-bote and cart-bote; unless restrained (which is usual) by particular covenants or exceptions [r]. The conversion of land from one species to another is waste. To convert wood, meadow, or pasture, into arable; to turn arable, meadow, or pasture, into woodland; or to turn arable or woodland into meadow or pasture, are all of them waste [s]. For, as sir Edward Coke observes [t], it not only changes the course of husbandry, but the evidence of the estate; when such a close, which is conveyed and described as pasture, is found to be arable, and *e converso*. And the same rule is observed, for the same reason, with regard to converting one species of edifice into another, even though it is improved in it's value [u]. To open the land to search for mines of metal, coal, *&c.* is waste; for that is a detriment to the inheritance [v]: but if the pits or mines were open before, it is no waste for the tenant to continue digging them for his own use [w]; for it is now become the mere annual profit of the land. These

[n] Co. Litt. 53.
[o] 4 Rep. 62.
[p] Co. Litt. 53.
[q] 2 Roll. Abr. 817.
[r] Co. Litt. 41.
[s] Hob. 234.
[t] Co. Litt. 53.
[u] 1 Lev. 309.
[v] 5 Rep. 12.
[w] Hob. 295.

(9) The statute of Anne does not interfere with the covenants between landlord and tenant; and therefore if a house in the occupation of a tenant be burnt down, he will still be liable at law to pay the rent under his covenant; and to rebuild, if there be a general covenant to repair. It is important therefore in a lease, for the tenant to except specially casualties by fire.

three are the general heads of waste, *viz.* in houses, in timber, and in land. Though, as was before said, whatever else tends to the destruction, or depreciating the value of the inheritance, is considered by the law as waste.

Let us next see, who are liable to be punished for committing waste. And by the feodal law, feuds being originally granted for life only, we find that the rule was general for all vasals or feudatories; "*si vasallus feudum dissipaverit, aut insigni detrimento deterius fecerit, privabitur.*" [x] But in our antient common law the rule was by no means so large; for not only he that was seised of an estate of inheritance might do as he pleased with it, but also waste was not punishable in any tenant, save only in three persons; guardian
[283] in chivalry, tenant in dower, and tenant by the curtesy [y]; and not in tenant for life or years [z]. And the reason of the diversity was, that the estate of the three former was created by the act of the law itself, which therefore gave a remedy against them; but tenant for life or for years, came in by the demise and lease of the owner of the fee, and therefore he might have provided against the committing of waste by his lessee; and if he did not, it was his own default. But, in favour of the owners of the inheritance, the statutes of Marlbridge 52 Hen. III. c. 23. and of Gloucester 6 Edw. I. c. 5., provided that the writ of waste shall not only lie against tenants by the law of England, (or curtesy,) and those in dower, but against any farmer or other that holds in any manner for life or years. So that, for about five hundred years past, all tenants merely for life, or for any less estate, have been punishable or liable to be impeached for waste, both voluntary and permissive; unless their leases be made, as sometimes they are, without impeachment of waste, *absque impetitione vasti*; that is, with a provision or protection that no man shall *impetere*, or sue him, for waste committed. But tenant in tail after possibility of issue extinct is not impeachable for waste; because his estate was at it's creation an estate

[x] Wright, 44.

[y] It was however a doubt whether waste was punishable at the common law in tenant by the curtesy. Regist. 72. Bro. Abr. *tit. waste*, 86. 2 Inst. 301.

[z] 2 Inst. 299.

of inheritance, and so not within the statutes. (10) Neither does an action of waste lie *for the debtor* against tenant by statute, recognizance, or *elegit*; because against them the debtor may set off the damages in account[b]; but it seems reasonable that it should lie *for the reversioner*, expectant on the determination of the debtor's own estate, or of these estates derived from the debtor[c].

The punishment for waste committed was, by common law and the statute of Marlbridge, only single damages[d]; except in the case of a guardian, who also forfeited his wardship[e] by the provisions of the great charter[f]: but the statute of Gloucester directs, that the other four species of tenants shall lose and forfeit the place wherein the waste is committed, and also treble damages to him that hath the inheritance. The expression of the statute is, "he shall forfeit "the *thing* which he hath wasted;" and it hath been deter- [284]

[a] Co. Litt. 27. 2 Roll. Abr. 826. 828.
[b] Co. Litt. 54.
[c] F. N. B. 58.
[d] 2 Inst. 146.
[e] *Ibid.* 300.
[f] 9 Hen. III. c. 4.

(10) In *Herlakenden's* case, 4 Rep. 63., it is said, that though tenant in tail after possibility of issue extinct is dispunishable for waste, yet he has no property in the timber which he fells. If this were true, it would establish a great difference between him and tenant for life without impeachment of waste, who is now clearly understood to have the same property in timber felled, as an owner of the fee simple. *Pyne* v. *Dor*, 1 T. R. 55. This distinction, however, is denied by Lord Eldon in *Williams* v. *Williams* 15 Ves. Jun. 427., and upon manifest reason. In both instances, however, (as well as in many others in which no action for waste committed can be brought) the court of chancery will interfere to restrain extravagant and malicious devastation. This term applies principally to the cutting down ornamental timber, timber planted for shelter, or to exclude the view of offensive objects, to the cutting down even of other timber in a wasteful manner, so as to leave none for the re-edifying or repair of buildings; and to all acts which tend to the destruction of the estate, as the unroofing, or pulling down mansion-houses. It is difficult to specify all the cases of waste in which injunctions will be granted; but Lord Eldon, in *Burges* v. *Lamb*, 16 Ves. Jun. 185., has expressed an opinion rather unfavourable to them, and has declared it to be wiser to limit than to extend them. It seems at least necessary to show some great injury to the inheritance resulting from an act, in doing which the tenant has not been actuated by a desire to derive profit from the estate, but by spite to the successor, or at least by humour and caprice in wanton disregard of the successor's interest.

mined that under these words the *place* is also included [g]. And if waste be done *sparsim*, or here and there, all over a wood, the whole wood shall be recovered; or if in several rooms of a house, the whole house shall be forfeited [h]; because it is impracticable for the reversioner to enjoy only the identical places wasted, when lying interspersed with the other. But if waste be done only in one end of a wood, (or perhaps in one room of a house, if that can be conveniently separated from the rest,) that part only is the *locus vastatus*, or thing wasted, and that only shall be forfeited to the reversioner [i].

VII. A seventh species of forfeiture is that of *copyhold* estates, by *breach* of the *customs* of the manor. Copyhold estates are not only liable to the same forfeitures as those which are held in socage, for treason, felony, alienation, and waste; whereupon the lord may seise them without any presentment by the homage [k]; but also to peculiar forfeitures annexed to this species of tenure, which are incurred by the breach of either the general customs of all copyholds, or the peculiar local customs of certain particular manors. And we may observe that, as these tenements were originally holden by the lowest and most abject vasals, the marks of feodal dominion continue much the strongest upon this mode of property. Most of the offences, which occasioned a resumption of the fief by the feodal law, and were denominated *felloniae, per quas vasallus amitteret feudum* [l], still continue to be causes of forfeiture in many of our modern copyholds. As, by subtraction of suit and service [m]; *si dominum deservire noluerit* [n]: by disclaiming to hold of the lord, or swearing himself not his copyholder [o]; *si dominum ejuraverit, i. e. negaverit se a domino feudum habere* [p]: by neglect to be admitted tenant within a year and a day [q]: *si per annum et diem cessaverit in petenda investitura* [r]: by contumacy in not appearing in court after three proclamations [s]; *si a domino ter citatus non*

[g] 2 Inst. 303.
[h] Co. Litt. 54.
[i] 2 Inst. 304.
[k] 2 Ventr. 38. Cro. Eliz. 499.
[l] *Feud. l.* 2. *t.* 26. *in calc.*
[m] 3 Leon. 108. Dyer. 211.
[n] *Feud. l.* 1. *t.* 21.
[o] Co. Copyh. § 57.
[p] *Feud. l.* 2. *t.* 34. & *t.* 26. § 3.
[q] Plowd. 372.
[r] *Feud. l.* 2. *t.* 24.
[s] 8 Rep. 99. Co. Copyh. § 57.

comparuerit[t]: or by refusing, when sworn of the homage, to present the truth according to his oath[u]: *si pares veritatem noverint, et dicant se nescire, cum sciant*[w]. In these and a variety of other cases, which it is impossible here to enumerate, the forfeiture does not accrue to the lord till after the offences are presented by the homage, or jury of the lord's court baron[x]: *per laudamentum parium suorum*[y]; or, as it is more fully expressed in another place[z], *nemo miles adimatur de possessione sui beneficii, nisi convicta culpa quae sit laudanda*[a] *per judicium parium suorum.* (11)

VIII. The eighth and last method whereby lands and tenements may become forfeited, is that of *bankruptcy*, or the act of becoming a bankrupt: which unfortunate person may

[t] *Feud. l. 2. t. 22.*
[u] Co. Copyh. § 57.
[w] *Feud. l. 2. t. 58.*
[x] Co. Copyh. § 58.
[y] *Feud. l. 1. t. 21.*
[z] *Ibid. t. 22.*
[a] *i. e. arbitranda, definienda.* Du Fresne, IV. 79.

(11) It is rather singular that in every instance in which Lord Coke on copyholds is cited in this paragraph, his authority is directly contradictory of the text. In his fifty-seventh chapter he divides forfeitures into those which operate *eo instante*, and those which must be presented; and then enumerates those of the former class. Under this he ranges, among many others, disclaimer, not appearing after three proclamations, and refusing, when sworn, to present the truth. In his fifty-eighth chapter he enumerates the second class, and under it places treason, felony, and alienation. It is observable also, that the references to Dyer 211. and 8 Rep. 99. are not in point.

With respect to the subject of the paragraph, if presentment is *necessary* in any case, it should seem in reason that the necessity would exist rather in case of treason and felony, where the conviction and attainder might take place far from the residence of the lord, than in the case of disclaimer, &c. which must take place either in the lord's court, or in a suit to which he was party. Of the first he might reasonably be supposed to remain ignorant until his homage by presentment informed him; of the latter he could hardly avoid taking instant notice. But in fact the better opinion seems to be, that in no case is presentment legally necessary. In every instance the forfeiture is referable back to a supposed determination of the will, which the act being inconsistent with the tenancy demonstrates. If the lord is not aware of the act, it is the duty of the homagers to inform him; but the forfeiture exists in that case before the information given. As a matter of prudence, however, the lord will of course procure a presentment. See Scriven on Copyholds, 511., in which the opinions of Ch. Baron Gilbert. and Watkins are stated.

from the several descriptions given of him in our statute law, be thus defined; a trader who secretes himself, or does certain other acts, tending to defraud his creditors.

Who shall be such a trader, or what acts are sufficient to denominate him a bankrupt, with the several connected consequences resulting from that unhappy situation, will be better considered in a subsequent chapter; when we shall endeavour more fully to explain its nature, as it most immediately relates to personal goods and chattels. I shall only here observe the manner in which the property of lands and tenements is transferred, upon the supposition that the owner of them is clearly and indisputably a bankrupt, and that a commission of bankrupt is awarded and issued against him.

By statute 13 Eliz. c. 7. the commissioners for that purpose, when a man is declared a bankrupt, shall have full power to dispose of all his lands and tenements, which he had in his own right at the time when he became a bankrupt, or which shall descend or come to him at any time afterwards, before his debts are satisfied or agreed for; and all lands and tene-
[286] ments which were purchased by him jointly with his wife or children to his own use, (or such interest therein as he may lawfully part with,) or purchased with any other person upon secret trust for his own use; and to cause them to be appraised to their full value, and to sell the same by deed indented and inrolled, or divide them proportionably among the creditors. This statute expressly included not only free, but customary and copyhold, lands; but did not extend to estates-tail, farther than for the bankrupt's life; nor to equities of redemption on a mortgaged estate, wherein the bankrupt has no legal interest, but only an equitable reversion. Whereupon the statute 21 Jac. I. c. 19. enacts, that the commissioners shall be empowered to sell or convey, by deed indented and inrolled [within six months after the making thereof], any lands or tenements of the bankrupt, wherein he shall be seised of an estate-tail in possession, remainder, or reversion, unless the remainder or reversion thereof shall be in the crown [or the gift of the crown]; and that such sale shall be good against all such issues in tail, remainder-men, and reversioners, whom the bankrupt himself might have

barred by a common recovery, or other means; and that all equities of redemption upon mortgaged estates, shall be at the disposal of the commissioners; for they shall have power to redeem the same as the bankrupt himself might have done, and after redemption to sell them. And also by this and a former act[b], all fraudulent conveyances to defeat the intent of these statutes are declared void; but that no purchaser *bona fide*, for a good or valuable consideration, shall be affected by the bankrupt laws, unless the commission be sued forth within five years after the act of bankruptcy committed.

By virtue of these statutes a bankrupt may lose all his real estates; which may at once be transferred by his commissioners to their assignees, without his participation or consent. (12)

[b] 1 Jac. I. c. 15.

(12) By 5 Geo. 4. c. 98. (the act to consolidate and amend the bankrupt laws, which will not take effect till May 1825), all the bankrupt's real and personal estate, both within the united kingdom and abroad, (except copyhold and customary lands,) and all such estate as he may purchase, or may revert, descend, or be devised to him before he obtains his certificate, are vested in the assignees by a mere declaration signed by the commissioners on the choice of the assignees; provided such declaration be entered of record within two months from the signature. The copyhold and customary estate, though excepted from this clause, may, by a subsequent one, be sold by deed indented and enrolled by the assignees for the benefit of the creditors. Estates tail may also be sold by them in the same manner, so as to convey a good title against the bankrupt, his issue, and all persons whom the bankrupt could have barred by fine, recovery, or other means.

which he himself had purchased; for over these he was thought to have a more extensive power than over what had been transmitted to him in a course of descent from his ancestors [h]: a doctrine which is countenanced by the feodal constitutions themselves [i] but he was not allowed to sell the whole of his own acquirements, so as totally to disinherit his children, any more than he was at liberty to aliene his paternal estate [k]. Afterwards a man seems to have been at liberty to part with all his own acquisitions, if he had previously purchased to him and his *assigns* by name; but, if his *assigns* were not specified in the purchase deed, he was not empowered to aliene [l]: and also he might part with one fourth of the inheritance of his ancestors without the consent of his heir [m]. By the great charter of Henry III. [n], no subinfeudation was permitted of part of the land, unless sufficient was left to answer the services due to the superior lord, which sufficiency was probably interpreted to be one half or moiety of the land [o]. But these restrictions were in general removed, by the statute of *quia emptores* [p], whereby all persons, except the king's tenants *in capite*, were left at liberty to aliene all or any part of their lands at their own discretion [q]. And even these tenants *in capite* were by the statute 1 Edw. III. c. 12. permitted to aliene, on paying a fine to the king [r]. By the temporary statutes 7 Hen. VII. c. 3. and 3 Hen. VIII. c. 4. all persons attending the king in his wars were allowed to aliene their lands without licence, and were relieved from other feodal burdens. And, lastly, these very fines for alienations were, in all cases of freehold tenure, entirely abolished by the statute 12 Car. II. c. 24. As to the power of *charging* lands with the debts of the owner, this was introduced so early as stat. Westm. 2. which [s] subjected a *moiety* of the

[289]

[h] *Emptiones vel acquisitiones suas det cui magis velit. Si Bocland habeat quam ei parentes sui dederunt, non mittat eum extra cognationem suam, LL. Hen. I. c. 70.*

[i] *Feud. l. 2. t. 39.*

[k] *Si questum tantum habuerit is, qui partem terrae suae donare voluerit, tunc quidem hoc ei licet; sed non totum questum, quia non potest filium suum haeredem exhaeredare.* Glanvil. *l.* 7. *c.* 1.

[l] Mirr. c. 1. § 3. This is also borrowed from the feodal law. *Feud. l.* 2. *t.* 48.

[m] Mirr. *ibid.*

[n] 9 Hen. III. c. 32.

[o] Dalrymple of Feuds, 95.

[p] 18 Edw. I. c. 1.

[q] See pag. 72. 91.

[r] 2 Inst. 67.

[s] 13 Ed. I. c. 18.

tenant's lands to executions, for debts recovered by law: as the *whole* of them was likewise subjected to be pawned in a statute merchant by the statute *de mercatoribus*, made the same year, (2) and in a statute staple by statute 27 Edw. III. c. 9. and in other similar recognizances by statute 23 Hen. VIII. c. 6. And now, the whole of them is not only subject to be *pawned* for the debts of the owner, but likewise to be absolutely *sold* for the benefit of trade and commerce by the several statutes of bankruptcy. The restraint of *devising* lands by will, except in some places by particular custom, lasted longer; that not being totally removed, till the abolition of the military tenures. The doctrine of *attornments* continued still later than any of the rest, and became extremely troublesome, though many methods were invented to evade them; (3) till at last they were made no longer necessary to complete the grant or conveyance, by statute 4 & 5 Ann. c. 16.; nor shall, by statute 11 Geo. II. c. 19, the attornment of any tenant affect the possession of any lands, unless made with consent of the landlord, or to a mortgagee after the mortgage is forfeited, or by direction of a court of justice. [290]

In examining the nature of alienation, let us first inquire, briefly, *who* may aliene, and to *whom*; and then, more largely, *how* a man may aliene, or the several modes of conveyance.

I. Who may aliene, and to whom: or, in other words, who is capable of conveying, and who of purchasing. And herein we must consider rather the incapacity, than capacity, of the several parties: for all persons in *possession* are *primâ facie* capable both of conveying and purchasing, unless the

(2) The statute *de mercatoribus* goes a step farther than is here mentioned. By the statute made with a similar view at Acton Burnell in 11 E. I., the devisable burgages of the debtor were made saleable in discharge of a debt due by statute merchant. The statute made in 13 E. I. extends this, and enables the debtor, within three months after he is taken and put into prison, to sell absolutely the whole of his lands and tenements for the discharge of his debts.

(3) The statute of uses, and the statute of wills, in all cases in which they applied, made attornments unnecessary; as by the former the possession was immediately executed to the use, and by the latter the legal estate was immediately vested in the devisee.

law has laid them under any particular disabilities. But, if a man has only in him the *right* of either possession or property, he cannot convey it to any other, lest pretended titles might be granted to great men, whereby justice might be trodden down, and the weak oppressed [s]. Yet reversions and vested remainders may be granted; because the possession of the particular tenant is the possession of him in reversion or remainder; but *contingencies*, and mere *possibilities*, though they may be released, or devised by will, or may pass to the heir or executor, yet cannot (it hath been said) be assigned to a stranger, unless coupled with some present interest [t].

Persons attainted of treason, felony, and *praemunire*, are incapable of conveying, from the time of the offence committed, provided attainder follows [u]: for such conveyance by them
[291] may tend to defeat the king of his forfeiture, or the lord of his escheat. But they may *purchase* for the benefit of the crown, or the lord of the fee, though they are disabled to *hold*: the lands so purchased, if after attainder, being subject to immediate forfeiture; if before, to escheat as well as forfeiture, according to the nature of the crime [w]. (4) So also corporations, religious or others, may purchase lands; yet, unless, they have a licence to hold in mortmain, they cannot retain such purchase; but it shall be forfeited to the lord of the fee [x].

Idiots and persons of nonsane memory, infants and persons under duress, are not totally disabled either to convey

[s] Co. Litt. 214.
[t] Sheppard's touchstone, 238, 239. 322. 11 Mod. 152. 1 P. Wms. 574. Stra. 132.
[u] Co. Litt. 42.
[w] *Ibid.* 2.
[x] *Ibid.* 2.

(4) After attainder the man is *civiliter mortuus*, all feudal relation between himself and his lord is at an end, and therefore there can be no escheat. Neither, strictly speaking, can there be forfeiture, which is a kind of punishment, and operates on the relation of king and subject. Indeed, by mere forfeiture in felony, the king's title would only be for a year and day. Lord Coke expresses himself therefore cautiously, calling it neither escheat, nor forfeiture; he says, "the king shall have it by his prerogative, and not the lord of the fee; for a man attainted hath no capacitie to purchase (being a man *civiliter mortuus*) but onely for the benefit of the king; no more than the alien-né hath."

or purchase, but *sub modo* only. For their conveyances and purchases are voidable, but not actually void. The king, indeed, on behalf of an idiot, may avoid his grants or other acts[xx]. But it hath been said, that a *non compos* himself, though he be afterwards brought to a right mind, shall not be permitted to allege his own insanity in order to avoid such grant: for that no man shall be allowed to stultify himself, or plead his own disability. The progress of this notion is somewhat curious. In the time of Edward I., *non compos* was a sufficient plea to avoid a man's own bond[y]: and there is a writ in the register[z] for the alienor himself to recover lands aliened by him during his insanity; *dum fuit non compos mentis suae, ut dicit, &c.* But under Edward III. a scruple began to arise, whether a man should be permitted to *blemish* himself, by pleading his own insanity[a]: and, afterwards, a defendant in assise having pleaded a release by the plaintiff since the last continuance, to which the plaintiff replied (*ore tenus*, as the manner then was,) that he was out of his mind when he gave it, the court adjourned the assise; doubting, whether as the plaintiff was sane both then and at the commencement of the suit, he should be permitted to plead an intermediate deprivation of reason; and the question was asked, how he came to remember the release, if out of his senses when he gave it[b]. Under Henry VI. this way of reasoning (that a man shall not be allowed to disable himself, by pleading his own incapacity, because he cannot know what he did under such a situation) was seriously adopted by the judges in argument[c], upon a question, whether the heir was barred of his right of entry by the feoffment of his insane ancestor. And from these loose authorities, which Fitzherbert does not scruple to reject as being contrary to reason[d], the maxim that a man shall not stultify himself hath been handed down as settled law[e]: though later opinions, feeling the inconvenience of the rule, have in many points [292]

[xx] Co. Litt. 247.

[y] Britton, c. 28. *fol.* 66.

[z] *fol.* 228. See also *Memorand. Scacch.* 22 *Edw.* I. (prefixed to Maynard's year-book, Edw. II.) *fol.* 23.

[a] 5 *Edw. III.* 70.

[b] 35 *Assis. pl.* 10.

[c] 39 *Hen. VI.* 42.

[d] F. N. B. 202.

[e] Litt. § 405. Cro. Eliz. 398. 4 Rep. 123. Jenk. 40.

endeavoured to restrain it [e]. (5) And, clearly, the next heir, or other person interested, may, after the death of the idiot or *non compos*, take advantage of his incapacity and avoid the grant [f]. And so, too, if he purchases under this disability, and does not afterwards upon recovering his senses agree to the purchase, his heir may either waive or accept the estate at his option [g]. In like manner, an infant may waive such purchase or conveyance, when he comes to full age; or, if he does not actually agree to it, his heirs may waive it after him [h]. Persons, also, who purchase or convey under duress, may affirm or avoid such transaction, whenever the duress is ceased [i]. For all these are under the protection of the law; which will not suffer them to be imposed upon, through the imbecility of their present condition; so that their acts are only binding, in case they be afterwards agreed to, when such imbecility ceases. Yet the guardians or committees of a lunatic, by the statute of 11 Geo. III. c.20. are empowered to renew in his right, under the directions of the court of chancery, any lease for lives or years, and apply the profits of such renewal for the benefit of such lunatic, his heirs or executors.

[e] Com. 469. 3 Mod. 310, 311. 1 Equ. cas. abr. 279.
[f] Perkins, § 21.
[g] Co. Litt. 2.
[h] *Ibid.*
[i] 2 Inst. 483. 5 Rep. 119.

(5) This doctrine does not seem to prevail in our ecclesiastical courts, for in *Turner* v. *Meyers*, 1 Haggard's Rep. 414. Lord Stowell annulled a marriage by reason of insanity of the husband, the husband himself being the promovent in the suit; and his lordship says expressly, "It is, I conceive, perfectly clear in law, that a party may come forward to maintain his own past incapacity." This case is entitled to the more consideration, because the suit had first been instituted by Turner's father, probably with a view to this very objection, and Lord Stowell then dismissed it.

And the student will understand the rule even in our common law courts to be restrained to the party's specially pleading his own insanity on the record, because I imagine it to be quite clear that any one may show himself in evidence to have been in such a state at the time of an act done, as that the act itself is void. As if A, a lunatic, seals a bond, and is sued upon it, when he recovers his intellect; he may plead that it is not his bond, and show his incapacity at the time of the sealing it.

THE case of a feme-covert is somewhat different. She may *purchase* an estate without the consent of her husband, and the conveyance is good during the coverture, till he avoids it by some act declaring his dissent [k]. And, though [293] he does nothing to avoid it, or even if he actually consents, the feme-covert herself may, after the death of her husband, waive or disagree to the same: nay, even her heirs may waive it after her, if she dies before her husband, or if in her widowhood she does nothing to express her consent or agreement [l]. But the *conveyance* or other contract of a feme-covert (except by some matter of record) is absolutely void, and not merely voidable [m]; and therefore cannot be affirmed or made good by any subsequent agreement.

THE case of an alien born is also peculiar. For he may purchase any thing; but after purchase he can *hold* nothing except a lease for years of a house for convenience of merchandize, in case he be an alien friend; all other purchases (when found by an inquest of office) being immediately forfeited to the king [n]. (6)

PAPISTS, lastly, and persons professing the popish religion, and neglecting to take the oath prescribed by statute 18

[k] Co. Litt. 3.
[l] *Ibid.*
[m] Perkins, § 154. 1 Sid 120.
[n] Co. Litt. 2.

(6) But 32 H. 8. c. 16. makes void all leases of dwelling-houses or shops to alien artificers or handicraftsmen, and imposes a penalty of 100s. for the granting or taking such lease. This statute, which is still unrepealed, undoubtedly needs the reconsideration of the legislature, for even in the case of a lease for the convenience of merchandize, Lord Coke lays it down, that if the merchant leaves the realm, or dies, in the one case his assignees, and in the other his executors or administrators shall not have the lease, but it shall go to the king; for that the sole ground of the exemption in his favour was the necessity of the habitation for the purpose of commerce, which ceasing, the exemption ceases also. Co. Litt. 2.

It should be observed, that while the occupation continues, it carries with it all the advantages and charges of an occupation by a native; thus an alien renting a dwelling-house of the yearly value of 10*l.*, and residing in it for 40 days, has been held to gain a settlement, *R.* v. *East Bourne*, 4 East, 103.; and if he hold as tenant from year to year, he is liable to an action for use and occupation. *Pilkington* v. *Peach*, 2 Show. 135.

Geo. III. c. 60. within the time limited for that purpose, are by statute 11 & 12 W. III. c. 4. disabled to purchase any lands, rents, or hereditaments; and all estates made to their use, or in trust for them, are void [o]. (7)

II. We are next, but principally, to enquire, *how* a man may aliene or convey; which will lead us to consider the several modes of conveyance.

In consequence of the admission of property, or the giving a separate right by the law of society to those things which by the law of nature were in common, there were necessarily some means to be devised, whereby that separate right or exclusive property should be originally acquired: which, we have more than once observed, was that of occupancy or first
[294] possession. But this possession, when once gained, was also necessarily to be continued; or else, upon one man's dereliction of the thing he had seised, it would again become common, and all those mischiefs and contentions would ensue, which property was introduced to prevent. For this purpose therefore of continuing the possession, the municipal law has established *descents* and *alienations*: the former to continue the possession in the heirs of the proprietor, after his *involuntary* dereliction of it by his death; the latter to continue it in those persons to whom the proprietor, by his own *voluntary* act, shall chuse to relinquish it in his lifetime. A translation, or transfer, of property being thus admitted by law, it became necessary that this transfer should be properly evidenced: in order to prevent disputes, either about the fact, as whether there was any transfer at all; or concerning the persons, by whom and to whom it was transferred; or with regard to the subject-matter, as what the thing transferred consisted of; or, lastly, with relation to the mode and quality of the transfer, as for what period of time (or, in other words for what estate and interest) the conveyance was made. The legal evidences of this translation of property are called the *common assurances* of the kingdom; whereby every man's

[o] 1 P. Wms. 354.

(7) See Vol. IV. p. 58. n. 6.

estate is assured to him, and all controversies, doubts, and difficulties are either prevented or removed.

THESE common assurances are of four kinds: 1. By matter *in pais*, or deed; which is an assurance transacted between two or more private persons *in pais*, in the country; that is, (according to the old common law,) upon the very spot to be transferred. 2. By matter of *record*, or an assurance transacted only in the king's public courts of record. 3. By special *custom*, obtaining in some particular places, and relating only to some particular species of property. Which three are such as take effect during the life of the party conveying or assuring. 4. The fourth takes no effect till after his death; and that is by *devise*, contained in his last will and testament. We shall treat of each in it's order.

CHAPTER THE TWENTIETH.

OF ALIENATION BY DEED.

IN treating of deeds I shall consider, first, their general nature; and, next, the several sorts or kinds of deeds with their respective incidents. And in explaining the former, I shall examine, first, what a deed is: secondly, it's requisites; and, thirdly, how it may be avoided.

I. FIRST, then, a deed is a writing sealed and delivered by the parties [a]. It is sometimes called a charter, *carta*, from it's materials; but most usually when applied to the transactions of private subjects, it is called a deed, in Latin *factum*, κατ' ἐξοχην, because it is the most solemn and authentic act that a man can possibly perform, with relation to the disposal of his property; and therefore a man shall always be *estopped* by his own deed, or not permitted to aver or prove any thing in contradiction to what he has once so solemnly and deliberately avowed [b]. If a deed be made by more parties than one, there ought to be regularly as many copies of it as there are parties, and each should be cut or indented (formerly in acute angles *instar dentium*, like the teeth of a saw, but at present in a waving line) on the top or side, to tally or correspond with the other: which deed, so made, is called an indenture. Formerly, when deeds were more concise than at present, it was usual to write both parts on the same piece of parchment, with some word or letters of the alphabet written between them; through which the parchment was cut, either in a straight or indented line, in such a manner as to leave half the word

[a] Co. Litt. 171. [b] Plowd. 434.

on one part and half on the other. Deeds thus made were denominated *syngrapha* by the canonists [c]; and with us *chirographa*, or hand-writings [d]; the word *cirographum* or *cyrographum* being usually that which is divided in making the indenture: and this custom is still preserved in making out the indentures of a fine, whereof hereafter. But at length indenting only has come into use, without cutting through any letters at all; and it seems at present to serve for little other purpose, than to give name to the species of the deed. When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the *original*, and the rest are *counterparts*: though of late it is most frequent for all the parties to execute every part; which renders them all originals. A deed made by one party only is not indented but *polled* or shaved quite even; and therefore called a *deed-poll*, or a single deed [e].

II. We are in the next place to consider the *requisites* of a deed. The first of which is, that there be persons able to contract and be contracted with, for the purposes intended by the deed: and also a thing, or subject-matter to be contracted for: all which must be expressed by sufficient names [f]. So as in every grant there must be a grantor, a grantee, and a thing granted; in every lease a lessor, a lessee, and a thing demised.

Secondly, the deed must be founded upon good and sufficient *consideration*. Not upon an usurious contract [g]; nor upon fraud or collusion, either to deceive purchasors *bonâ fide* [h], or just and lawful creditors [i]; any of which bad considerations will vacate the deed, and subject such persons, as put the same in ure, to forfeitures, and often to imprisonment. (1) A deed also, or other grant, made without any

[c] Lyndew. *l.* 1. *t.* 10. *c.* 1.
[d] Mirror. *c.* 2. § 27.
[e] *Ibid.* Litt. § 371, 372.
[f] Co. Litt. 35.
[g] Stat. 12 Anne, st. 2. c. 16.
[h] Stat. 27 Eliz. c. 4.
[i] Stat. 13 Eliz. c. 5.

(1) The deed will not be void as between the parties themselves, that is, the grantor or grantee cannot vacate their own act, but it will be void as against

consideration is, as it were, of no effect: for it is construed to enure, or to be effectual, only to the use of the grantor himself[k]. (2) The consideration may be either a *good* or a
[297] *valuable* one. A good consideration is such as that of blood, or of natural love and affection, when a man grants an estate to a near relation; being founded on motives of generosity, prudence, and natural duty; a valuable consideration is such as money, marriage, or the like, which the law esteems an equivalent given for the grant[l]: and is therefore founded in motives of justice. Deeds made upon good consideration only, are considered as merely voluntary, and are frequently set aside in favour of creditors, and *bonâ fide* purchasors.

Thirdly; the deed must be *written*, or I presume *printed*, for it may be in any character or any language; but it must be upon paper or parchment. For if it be written on stone, board, linen, leather, or the like, it is no deed[m]. Wood or

[k] Perk. § 583.
[l] 3 Rep. 83.
[m] Co. Litt. 229. F. N. B. 122.

against *bonâ fide* purchasors and lawful creditors. The purchasor here intended must have bought for a valuable consideration, and as against him a voluntary grant, or one made on good consideration, is held fraudulent merely because voluntary, and will be set aside even though he had notice of its existence before he paid his purchase money. See the luminous judgment pronounced by Lord Ellenborough to this effect, in the case of *Otley* v. *Manning*, 9 East. p. 59. in which all the prior decisions were reviewed, and those overturned, which had laid down, that there must be some circumstance of actual fraud in the first deed, beyond the want of valuable consideration, in order to make it void.

(2) This sentence is not quite accurately worded; from the expression "deed or other grant," it might be inferred that a deed was a species of grant, whereas a grant is only one mode of conveyance by deed; next, it is not true that all deeds, or all grants made without consideration, are of no effect, for, 1st, As to all deeds which operate at common law, or by transmutation of possession, I imagine that they will be valid at law to pass the estates they profess to pass, as against the grantor, though made without any consideration; and 2dly, As to deeds which operate under the statute of uses, they create a use which results to the grantor. To all appearance, indeed, no change is made in the grantor's title or rights by such a deed, yet that it is without effect in law, cannot be said, because it works such an alteration in the grantor's estate, from that which he had before, that any devise of the lands made before the date of the deed will take no effect, unless the will be republished, that is in fact new made.

stone may be more durable, and linen less liable to rasures; but writing on paper or parchment unites in itself, more perfectly than any other way, both those desirable qualities: for there is nothing else so durable, and at the same time so little liable to alteration; nothing so secure from alteration, that is at the same time so durable. It must also have the regular stamps imposed on it by the several statutes for the increase of the public revenue; else it cannot be given in evidence. Formerly many conveyances were made by parol, or word of mouth only, without writing; but this giving a handle to a variety of frauds, the statute 29 Car. II. c. 3. enacts, that no lease estate or interest in lands, tenements, or hereditaments, made by livery of seisin, or by parol only, (except leases, not exceeding three years from the making, and whereon the reserved rent is at least two-thirds of the real value,) shall be looked upon as of greater force than a lease or estate at will; nor shall any assignment, grant, or surrender of any interest in any freehold hereditaments be valid: unless in both cases the same be put in writing, and signed by the party granting, or his agent lawfully authorized in writing.

FOURTHLY; the matter written must be *legally* and *orderly* set forth: that is, there must be words sufficient to specify the agreement and bind the parties; which sufficiency must be left to the courts of law to determine[n]. For it is [298] not absolutely necessary in law to have all the formal parts that are usually drawn out in deeds, so as there be sufficient words to declare clearly and legally the party's meaning. But, as these formal and orderly parts are calculated to convey that meaning in the clearest, distinctest, and most effectual manner, and have been well considered and settled by the wisdom of successive ages, it is prudent not to depart from them without good reason or urgent necessity; and therefore I will here mention them in their usual [o] order.

1. THE *premises* may be used to set forth the number and names of the parties, with their additions or titles. They also contain the recital, if any, of such deeds, agreements, or

[n] Co. Litt. 225. [o] *Ibid.* 6.

matters of fact, as are necessary to explain the reasons upon which the present transaction is founded; and herein also is set down the consideration upon which the deed is made. And then follows the certainty of the grantor, grantee, and thing granted [p].

2, 3. Next come the *habendum* and *tenendum* [q]. The office of the *habendum* is properly to determine what estate or interest is granted by the deed: though this may be performed, and sometimes is performed, in the premises. In which case the *habendum* may lessen, enlarge, explain, or qualify, but not totally contradict or be repugnant to the estate granted in the premises. As if a grant be "to A and "the heirs of his body," in the premises, *habendum* "to him "and his heirs for ever," or *vice versa*: here A has an estate tail, and a fee-simple expectant thereon [r]. But, had it been in the premises "to him and his heirs," *habendum* "to him "for life," the *habendum* would be utterly void [s]; for an estate of inheritance is vested in him before the *habendum* comes, and shall not afterwards be taken away or devested by it. The *tenendum*, "and to hold," is now of very little use, and is only kept in by custom. It was sometimes formerly used to signify the tenure by which the estate granted was to be holden; *viz.* "*tenendum per servitium militare, in* "*burgagio, in libero socagio, &c.*" But all these being now reduced to free and common socage, the tenure is never specified. Before the statute of *quia emptores*, 18 Ed. I., it was also sometimes used to denote the lord of whom the land should be holden: but that statute directing all future purchasors to hold, not of the immediate grantor, but of the chief lord of the fee, this use of the *tenendum* hath been also antiquated; though for a long time after we find it mentioned in antient charters, that the tenements shall be holden *de capitalibus dominis feodi* [t]; but as this expressed nothing more than the statute had already provided for, it gradually grew out of use.

[*299]

[p] See Appendix, N° II. § 1. pag. v.
[q] *Ibid.*
[r] Co. Litt. 21. 2 Roll. Rep. 19. 23. *passim.* Cro. Jac. 476.
[s] 2 Rep. 23. 8 Rep. 56.
[t] Appendix, N° I. Madox. *Formul.*

4. NEXT follow the terms of stipulation, if any, upon which the grant is made: the first of which is the *reddendum* or reservation, whereby the grantor doth create or reserve some new thing to himself out of what he had before granted, as "rendering therefore yearly the sum of ten shillings, or "a pepper-corn, or two days' ploughing, or the like[u]." Under the pure feodal system, this render, *reditus*, return or rent, consisted in chivalry, principally of military services; in villeinage, of the most slavish offices; and in socage, it usually consists of money, though it may still consist of services, or of any other certain profit[w]. To make a *reddendum* good, if it be of any thing newly created by the deed, the reservation must be to the grantors, or some, or one of them, and not to any stranger to the deed[x]. But if it be of antient services or the like, annexed to the land, then the reservation may be to the lord of the fee[y].

5. ANOTHER of the terms upon which a grant may be made is a *condition*; which is a clause of contingency, on the happening of which the estate granted may be defeated; as, "provided always, that if the mortgagor shall pay the mort- "gagee 500*l.* upon such a day, the whole estate granted [300] "shall determine;" and the like[z].

6. NEXT may follow the clause of *warranty*; whereby the grantor doth, for himself and his heirs, warrant and secure to the grantee the estate so granted[a]. By the feodal constitution, if the vasal's title to enjoy the feud was disputed, he might vouch, or call the lord or donor to warrant or insure his gift; which if he failed to do, and the vasal was evicted, the lord was bound to give him another feud of equal value in recompence[b]. And so, by our antient law, if before the statute of *quia emptores* a man enfeoffed another in fee, by the feodal verb *dedi*, to hold of himself and his heirs by certain services; the law annexed a warranty to this grant, which bound the feoffor and his heirs, to whom the

[u] Appendix, N° II. § 1. pag. iii.
[w] See pag. 41.
[x] Plowd. 132. 8 Rep. 71.
[y] Appendix, N° I. pag. i.
[z] Appendix, N° II. § 2. pag. viii.
[a] *Ibid.* N° I. pag. i.
[b] *Feud. l.* 2 *t.* 8 & 25.

services (which were the consideration and equivalent for the gift) were originally stipulated to be rendered [c]. Or if a man and his ancestors had immemorially holden land of another and his ancestors by the service of homage, (which was called *homage auncestrel*) this also bound the lord to warranty [d]; the homage being an evidence of such a feodal grant. And, upon a similar principle, in case, after a partition or exchange of lands of inheritance, either party or his heirs be evicted of his share, the other and his heirs are bound to warranty [e], because they enjoy the equivalent. And so, even at this day, upon a gift in tail or lease for life, rendering rent, the donor or lessor and his heirs (to whom the rent is payable) are bound to warrant the title [f]. But in a feoffment in fee, by the verb *dedi*, since the statute of *quia emptores*, the feoffor only is bound to the implied warranty, and not his heirs [g]: because it is a mere personal contract on the part of the feoffor, the tenure (and of course the antient services) resulting back to the superior lord of the fee. And in other forms of alienation, gradually introduced since that statute,
[301] no warranty whatsoever is implied [h]; they bearing no sort of analogy to the original feodal donation. And therefore in such cases it became necessary to add an express clause of warranty to bind the grantor and his heirs; which is a kind of covenant real, and can only be created by the verb *warrantizo* or *warrant* [i].

These express warranties were introduced, even prior to the statute of *quia emptores*, in order to evade the strictness of the feodal doctrine of non-alienation without the consent of the heir. For, though he, at the death of his ancestor, might have entered on any tenements that were aliened without his concurrence, yet if a clause of warranty was added to the ancestor's grant, this covenant descending upon the heir insured the grantee; not so much by confirming his title, as by obliging such heir to yield him a recompence in lands of equal value: the law, in favour of alienations, supposing that no ancestor would wantonly disinherit his next of blood [k]: and

[c] Co. Litt. 384.
[d] Litt. § 143.
[e] Co. Litt. 174.
[f] *Ibid.* 384.
[g] Co. Litt. 384.
[h] *Ibid.* 102.
[i] Litt. § 733.
[k] Co. Litt. 373.

therefore presuming that he had received a valuable consideration, either in land, or in money which had purchased land, and that this equivalent descended to the heir together with the ancestor's warranty. So that when either an ancestor, being the rightful tenant of the freehold, conveyed the land to a stranger and his heirs, or released the right in fee-simple to one who was already in possession, and superadded a warranty to his deed, it was held that such warranty not only bound the warrantor himself to protect and assure the title of the warrantee, but it also bound his heir: and this, whether that warranty was *lineal* or *collateral* to the title of the land. *Lineal* warranty was, where the heir derived, or might by possibility have derived, his title to the land warranted, either from or through the ancestor who made the warranty: as where a father, or an elder son in the life of the father, released to the disseisor of either themselves or the grandfather, with warranty, this was lineal to the younger son [l]. *Collateral* warranty was where the heir's title to the land neither was, nor could have been derived from the warranting [302] ancestor; as where a younger brother released to his father's disseisor, with warranty, this was collateral to the elder brother [m]. But where the very conveyance, to which the warranty was annexed, immediately followed a disseisin, or operated itself as such, (as, where a father tenant for years, with remainder to his son in fee, aliened in fee-simple with warranty,) this, being in its original manifestly founded on the *tort* or wrong of the warrantor himself, was called a warranty *commencing by disseisin*; and, being too palpably injurious to be supported, was not binding upon any heir of such tortious warrantor [n].

In both lineal and collateral warranty, the obligation of the heir (in case the warrantee was evicted, to yield him other lands in their stead) was only on condition that he had other sufficient lands by descent from the warranting ancestor [o]. But though without assets, he was not bound to insure the title of *another*, yet in case of lineal warranty, whether assets descended or not, the heir was perpetually

[l] Litt. § 703. 706, 707.
[m] Litt. § 705. 707.
[n] Litt. § 698. 702.
[o] Co. Litt. 102.

barred from claiming the land *himself:* for if he could succeed in such claim, he would then gain assets by descent, (if he had them not before,) and must fulfil the warranty of his ancestor: and the same rule[p] was with less justice adopted also in respect of collateral warranties, which likewise (though no assets descended) barred the heir of the warrantor from claiming the land by any collateral title; upon the presumption of law that he might hereafter have assets by descent either from or through the same ancestor. The inconvenience of this latter branch of the rule was felt very early, when tenants by the curtesy took upon them to aliene their lands with warranty: which collateral warranty of the father descending upon the son (who was the heir of both his parents) barred him from claiming his maternal inheritance; to remedy which the statute of Gloucester, 6 Edw. I. c. 3. declared, that such warranty should be no bar to the son, unless assets descended from the father. It was afterwards attempted in
[303] 50 Edw. III. to make the same provision universal, by enacting, that no collateral warranty should be a bar, unless where assets descended from the same ancestor[q]; but it then proceeded not to effect. However, by the statute 11 Hen. VII., c. 20., notwithstanding any alienation with warranty by tenant in dower, the heir of the husband is not barred, though he be also heir to the wife. And by statute 4 & 5 Ann. c. 16. all warranties by any tenant for life shall be void against those in remainder or reversion; and all collateral warranties by any ancestor who has no estate of inheritance in possession, shall be void against his heir. By the wording of which last statute it should seem that the legislature meant to allow, that the collateral warranty of tenant in tail in possession, descending (though without assets) upon a remainder-man or reversioner, should still bar the remainder or reversion. For though the judges, in expounding the statute *de donis*, held that, by analogy to the statute of Gloucester, a lineal warranty by the tenant in tail without assets should not bar the issue in tail, yet they held such warranty with assets to be a sufficient bar[r]: which was therefore formerly mentioned as one of the ways whereby an estate-tail might be destroyed

[p] Litt. § 714, 712.
[q] Co. Litt. 373.
[r] Litt. § 712. 2 Inst. 293.
[s] Pag. 116.

it being indeed nothing more in effect than exchanging the lands entailed for others of equal value. They also held, that collateral warranty was not within the statute *de donis*; as that act was principally intended to prevent the tenant in tail from disinheriting his own issue: and therefore collateral warranty (though without assets) was allowed to be, as at common law, a sufficient bar of the estate tail, and all remainders and reversions expectant thereon [t]. And so it still continues to be, notwithstanding the statute of queen Anne, if made by tenant in tail in possession; who therefore may now, without the forms of a fine or recovery, in some cases make a good conveyance in fee-simple, by superadding a warranty to his grant; which, if accompanied with assets, bars his own issue, and without them bars such of his heirs as may be in remainder or reversion. (3)

7. After warranty usually follow *covenants*, or conven- [304] tions, which are clauses of agreement contained in a deed, whereby either party may stipulate for the truth of certain facts, or may bind himself to perform, or give, something to the other. Thus the grantor may covenant that he hath a right to convey; or for the grantee's quiet enjoyment; or the like: the grantee may covenant to pay his rent, or keep the premises in repair, *&c.* [u] If the covenantor covenants for himself and his *heirs*, it is then a covenant real, and descends upon the heirs; who are bound to perform it, provided they have assets by descent, but not otherwise; if he covenants also for his *executors* and *administrators*, his personal assets, as well as his real, are likewise pledged for the performance of the covenant; which makes such covenant a better security than any warranty. (4) It is also in some

[t] Co. Litt. 374. 2 Inst. 335. [u] Appendix, N° II. § 2. pag. viii.

(3) Upon this intricate subject, which is now become more useful to be studied for the sake of a full understanding of the older law writers, than for its own practical use, I refer the student to Mr. Butler's notes on the chapter of Warrantie in Co. Litt., especially notes 315. and 328.

(4) This is not a correct description of a covenant real, which is that whereby an obligation to pass something real is created, as lands or tenements, or the obligation of which is so connected with the realty, that he who has the latter is either entitled to the benefit of, or liable to perform the other. Fitzh. N. B. 145. Shep. Touch. c. vii. p. 161. Thus a war-

respects a less security, and therefore more beneficial to the grantor; who usually *covenants* only for the acts of himself and his ancestors, whereas a general *warranty* extends to all mankind. For which reasons the covenant has in modern practice totally superseded the other.

8. Lastly, comes the *conclusion*, which mentions the execution and date of the deed, or the time of it's being given or executed, either expressly, or by reference to some day and year before mentioned [w]. Not but a deed is good, although it mention no date: or hath a false date; or even if it hath an impossible date, as the thirtieth of February; provided the real day of it's being dated or given, that is delivered, can be proved [x].

I proceed now to the *fifth* requisite for making a good deed; the *reading* of it. This is necessary, wherever any of the parties desire it; and, if it be not done on his request, the deed is void as to him. If he can, he should read it himself: if he be blind or illiterate, another must read it to him. If it be read falsely, it will be void; at least for so much as is misrecited: unless it be agreed by collusion that the deed shall be read false on purpose to make it void; for in such case it shall bind the fraudulent party [y].

[305] Sixthly, it is requisite that the party, whose deed it is, should *seal*, and now in most cases I apprehend should *sign* it also. The use of seals, as a mark of authenticity to letters and other instruments in writing, is extremely antient. We read of it among the Jews and Persians in the earliest and

[w] Appendix, No. II. § 2. pag. xii.
[x] Co. Litt. 46. Dyer, 28.
[y] 2 Rep. 3. 9. 11 Rep. 27.

---

ranty is a real covenant; a covenant to levy a fine, &c. The heirs of the covenantor, with assets descended, may be sued for the breach of any covenant, whether real or personal, to the performance of which they are expressly bound. On the other hand, executors and administrators are bound by all covenants of the testator or intestate, whether named or not, except the thing, which was the object of the covenant, related to the realty, or was something to be performed personally by the covenantor, the obligation to perform which of course ended with his life. Cro. Eliz. 558. See these liabilities more fully considered, Vol. III. p. 158. n. (10).

most sacred records of history [z]. And in the book of Jeremiah there is a very remarkable instance, not only of an attestation by seal, but also of the other usual formalities attending a Jewish purchase [a]. In the civil law also [b], seals were the evidence of truth; and were required, on the part of the witnesses at least, at the attestation of every testament. But in the times of our Saxon ancestors, they were not much in use in England. For though sir Edward Coke [c] relies on an instance of king Edwin's making use of a seal about an hundred years before the conquest, yet it does not follow that this was the usage among the whole nation: and perhaps the charter he mentions may be of doubtful authority, from this very circumstance of being sealed; since we are assured by all our antient historians, that sealing was not then in common use. The method of the Saxons was for such as could write to subscribe their names, and, whether they could write or not, to affix the sign of the cross; which custom our illiterate vulgar do, for the most part, to this day keep up; by signing a cross for their mark, when unable to write their names. And indeed this inability to write, and therefore making a cross in it's stead, is honestly avowed by Caedwalla, a Saxon king, at the end of one of his charters [d]. In like manner, and for the same unsurmountable reason, the Normans, a brave but illiterate nation, at their first settlement in France, used the practice of sealing only, without writing [306] their names: which custom continued, when learning made it's way among them, though the reason for doing it had ceased; and hence the charter of Edward the confessor to Westminster-abbey, himself being brought up in Normandy,

[z] 1 Kings, c. 21. Daniel, c. 6. Esther, c. 8.

[a] "And I bought the field of Hanameel, my uncle's son, that was in Anathoth, and weighed him the money, even seventeen shekels of silver. And I subscribed the evidence, and sealed it, and took witnesses, and weighed him the money in the balances. So I took the evidence of the purchase, both that which was sealed according to the law and custom, and that which was open." c. 32.

[b] *Inst.* 2. 10. 2 & 3.

[c] 1 *Inst.* 7.

[d] "*Propria manu pro ignorantia litterarum signum sanctae crucis expressi et subscripsi.*" Seld. *Jan. Angl.* l. 1. § 42. And this (according to Procopius) the emperor Justin in the east, and Theodoric king of the Goths in Italy, had before authorized by their example, on account of their inability to write.

was witnessed only by his seal, and is generally thought to be the oldest sealed charter of any authenticity in England [e]. At the conquest, the Norman lords brought over into this kingdom their own fashions; and introduced waxen seals only, instead of the English method of writing their names, and signing with the sign of the cross [f]. And in the reign of Edward I. every freeman, and even such of the more substantial villeins as were fit to be put upon juries, had their distinct particular seals [g]. The impressions of these seals were sometimes a knight on horseback, sometimes other devices: but coats of arms were not introduced into seals, nor indeed into any other use, till about the reign of Richard the first, who brought them from the croisade in the holy land; where they were first invented and painted on the shields of the knights, to distinguish the variety of persons of every christian nation who resorted thither, and who could not, when clad in complete steel, be otherwise known or ascertained.

This neglect of signing, and resting only upon the authenticity of seals, remained very long among us; for it was held in all our books that sealing alone was sufficient to authenticate a deed; and so the common form of attesting deeds, — "*sealed* and delivered," continues to this day; notwithstanding the statute 29 Car. II. c.3. before mentioned, revives the Saxon custom, and expressly directs the signing, in all grants of lands, and many other species of deeds: in which therefore signing seems to be now as necessary as sealing, though it hath been sometimes held that the one includes the other [h].

A seventh requisite to a good deed is, that it be *delivered* by the party himself or his certain attorney, which therefore [307] is also expressed in the attestation; "sealed and *delivered*." A deed takes effect only from this tradition or delivery; for if the date be false or impossible, the delivery ascertains the time of it. And if another person seals the deed, yet if the

[e] Lamb. *Archeion.* 51.

[f] "*Normanni chirographorum confectionem, cum crucibus aureis, aliisque signaculis sacris, in Anglia firmari solitam, in cæram impressam mutant, modumque scribendi Anglicum rejiciunt.*" Ingulph.

[g] Stat. Exon. 14 Ed. I.

[h] 3 Lev. 1. Stra. 764.

party delivers it himself, he thereby adopts the sealing [i], and by a parity of reason the signing also, and makes them both his own. A delivery may be either absolute, that is, to the party or grantee himself; or to a third person, to hold till some conditions be performed on the part of the grantee: in which last case it is not delivered as a *deed*, but as an *escrow*; that is, as a scrowl or writing, which is not to take effect as a deed till the conditions be performed; and then it is a deed to all intents and purposes [j]. (5)

The *last* requisite to the validity of a deed is the *attestation*, or execution of it *in the presence of witnesses*: though this is necessary, rather for preserving the evidence, than for constituting the essence of the deed. Our modern deeds are in reality nothing more than an improvement or amplification of the *brevia testata* mentioned by the feodal writers [k], which were written memorandums, introduced to perpetuate the tenor of the conveyance and investiture, when grants by parol only became the foundation of frequent dispute and uncertainty. To this end they registered in the deed the persons who attended as witnesses, which was formerly done without their signing their names, (that not being always in their power,) but they only heard the deed read; and then the clerk or scribe added their names in a sort of memorandum; thus: "*hijs testibus Johanne Moore, Jacobo Smith, et aliis, "ad hanc rem convocatis*[l]." This, like all other solemn transactions, was originally done only *coram paribus* [m], and frequently when assembled in the court baron, hundred, or county court; which was then expressed in the attestation, *teste comitatu hundredo, &c.* [n] Afterwards the attestation of

[i] Perk. § 130.
[j] Co. Litt. 36.
[k] *Feud. l.* 1. *t.* 4.
[l] Co. Litt. 6.
[m] *Feud. l.* 2. *t.* 32.
[n] Spelm. *Gloss.* 228. Madox, *Formul.* N° 21. 322. 660.

(5) In a case which turned upon the point whether an instrument was delivered as an escrow, or a deed, Abbott C. J. told the jury, that "to make the delivery conditional, it was not necessary that any express words to that effect should be used at the time; that the conclusion was to be drawn from all the circumstances; that it obviated all question as to the intention of the party, if at the time of the delivery he expressly declared that he delivered it as an escrow, but that that was not essential to make it such. *Murray* v. *Earl of Stair*, 2 B. & C. 88.

other witnesses was allowed, the trial in case of a dispute being still reserved to the *pares*; with whom the witnesses (if more than one) were associated and joined in the verdict [o]; till that also was abrogated by the statute of York, 12 Edw. II. st. 1. c. 2. And in this manner, with some such clause of *hijs testibus*, are all old deeds and charters, particularly *magna carta*, witnessed. And in the time of sir Edward Coke, creations of nobility were still witnessed in the same manner [p]. But in the king's common charters, writs, or letters patent, the style is now altered; for at present the king is his own witness, and attests his letters patent thus: "*teste meipso*, witness ourself at Westminster, *&c.*" a form which was introduced by Richard the first [q], but not commonly used till about the beginning of the fifteenth century; nor the clause of *hijs testibus* entirely discontinued till the reign of Henry the eighth [r]: which was also the æra of discontinuing it in the deeds of subjects, learning being then revived, and the faculty of writing more general; and therefore ever since that time the witnesses have usually subscribed their attestations, either at the bottom, or on the back of the deed [s].

III. We are next to consider, how a deed may be *avoided*, or rendered of no effect. And from what has been before laid down it will follow, that if a deed wants any of the essential requisites before mentioned; either, 1. Proper parties, and a proper subject-matter: 2. A good and sufficient consideration: 3. Writing on paper or parchment, duly stamped: 4. Sufficient and legal words, properly disposed: 5. Reading, if desired, before the execution: 6. Sealing, and, by the statute, in most cases signing also: or, 7. Delivery; it is a void deed *ab initio*. It may also be avoided by matter *ex post facto*: as, 1. By rasure, interlining, or other alteration in any material part: unless a memorandum be made thereof at the time of the execution and attestation [t]. 2. By breaking off, or defacing the seal [u]. (6) 3. By delivering it up to be cancelled

[o] Co. Litt. 6.
[p] 2 Inst. 77.
[q] Madox *Formul.* N° 515.
[r] *Ibid.* Dissert. fol. 32.
[s] 2 Inst. 78. See pag. 378.
[t] 11 Rep. 27.
[u] 5 Rep. 23.

(6) This must be understood of an intentional breaking off, or defacing by some one other than the party liable on the deed. A breaking off or defacing

that is, to have lines drawn over it in the form of lattice-work or *cancelli*; though the phrase is now used figuratively for any manner of obliteration or defacing it. 4. By the disagreement of such, whose concurrence is necessary, in order for the deed to stand: as the husband, where a feme-covert is concerned; an infant, or person under duress, when those disabilities are removed; and the like. 5. By the judgment or decree of a court of judicature. This was antiently the province of the court of star-chamber, and now of the chancery: when it appears that the deed was obtained by fraud, force, or other foul practice; or is proved to be an absolute forgery [w]. (7) In any of these cases the deed may be voided, either in part or totally, according as the cause of avoidance is more or less extensive.

And, having thus explained the general nature of deeds, we are next to consider their several species, together with their respective incidents. And herein I shall only examine the particulars of those, which, from long practice and experience of their efficacy, are generally used in the alienation of *real* estates: for it would be tedious, nay infinite, to descant upon all the several instruments made use of in *personal* concerns, but which fall under our general definition of a deed; that is, a writing sealed and delivered. The former, being principally such as serve to *convey* the property of lands and tenements from man to man, are commonly denominated *conveyances*: which are either conveyances at *common law*, or such as receive their force and efficacy by virtue of the *statute of uses*.

[w] Toth. *numo.* 24. 1 Vern. 348.

---

defacing by the party bound, will not avoid the deed on the simplest principles of law and justice. Touchstone, c. iv. s. 6. 2. And where it can be shown that the seal was once affixed, and that the breaking it off or defacing has been accidental and unintentional, the deed will still be binding. Palmer, 403. And in no case will the defacing of the seal have a retrospective effect, so as to devest estates which had once passed by the deed. *Bolton* v. *Bishop of Carlisle*, 2 H. Bl. 263.

(7) In either of the cases here supposed, a court of common law is equally competent to render the deed of no effect, as a court of equity; upon the simple principle that such a deed is not "the deed" of the party sought to be charged by it.

I. Of conveyances by the common law, some may be called *original*, or *primary* conveyances; which are those by means whereof the benefit or estate is created or first arises: others are *derivative*, or *secondary*: whereby the benefit or estate, originally created, is enlarged, restrained, transferred, or extinguished.

[310] Original conveyances are the following; 1. Feoffment; 2. Gift; 3. Grant; 4. Lease; 5. Exchange; 6. Partition: *derivative* are, 7. Release; 8. Confirmation; 9. Surrender; 10. Assignment; 11. Defeazance.

1. A feoffment, *feoffamentum*, is a substantive derived from the verb, to enfeoff, *feoffare* or *infeudare*, to give one a feud; and therefore feoffment is properly *donatio feudi*[x]. It is the most antient method of conveyance, the most solemn and public, and therefore the most easily remembered and proved. And it may properly be defined, the gift of any corporeal hereditament to another. He that so gives, or enfeoffs, is called the *feoffor*; and the person enfeoffed is denominated the *feoffee*. (8)

This is plainly derived from, or is indeed itself the very mode of, the antient feodal donation; for though it may be performed by the word, "*enfeoff*" or "grant," yet the aptest word of feoffment is, "*do* or *dedi*[y]." And it is still directed and governed by the same feodal rules; insomuch that the principal rule relating to the extent and effect of the feodal grant, "*tenor est qui legem dat feudo*," is in other words become the maxim of our law with relation to feoffments, "*modus legem dat donationi*[z]." And therefore, as in pure feodal donations the lord, from whom the feud moves, must expressly limit and declare the continuance or quantity of estate which he means to confer, "*ne quis plus donasse prae-*

[x] Co. Litt. 9.
[y] *Ibid.*
[z] Wright, 21.
[a] pag. 108.

(8) Mr. Sanders's description of a feoffment at common law is more perfect than that given in the text: he calls it a conveyance of corporeal hereditaments from one person to another by delivery of the possession, upon or within view of the hereditaments so conveyed. On Uses and Trusts, vol. ii. p. 1.

"*sumatur quam in donatione expresserit*[a];" so, if one grants by feoffment lands or tenements to another, and limits or expresses no estate, the grantee (due ceremonies of law being performed) hath barely an estate for life[b]. For as the personal abilities of the feoffee were originally presumed to be the immediate or principal inducements to the feoffment, the feoffee's estate ought to be confined to his person, and subsist only for his life; unless the feoffor, by express provision in the creation and constitution of the estate, hath given it a longer continuance. These express provisions are indeed generally made; for this was for ages the only conveyance, whereby our ancestors were wont to create an estate in fee-simple[c], by giving the land to the feoffee, to hold to him and his heirs for ever; though it serves equally well to convey any other estate or freehold[d]. [311]

But by the mere words of the deed the feoffment is by no means perfected, there remains a very material ceremony to be performed, called *livery of seisin*; without which the feoffee has but a mere estate at will[e]. This livery of seisin is no other than the pure feodal investiture, or delivery of corporal possession of the land or tenement; which was held absolutely necessary to complete the donation. "*Nam feudum sine investitura nullo modo constitui potuit*[f]:" and an estate was then only perfect, when, as the author of Fleta expresses it in our law, "*fit juris et seisinae conjunctio*[g]."

Investitures, in their original rise, were probably intended to demonstrate in conquered countries the actual possession of the *lord*; and that he did not grant a bare litigious right, which the soldier was ill qualified to prosecute, but a peaceable and firm possession. And at a time when writing was seldom practised, a mere oral gift, at a distance from the spot that was given, was not likely to be either long or accurately retained in the memory of by-standers, who were very little interested in the grant. Afterwards they were retained as a public and notorious act, that the country might take notice of and testify the transfer of the estate; and that such, as

[a] Co. Litt. 42.
[b] See Appendix, N° I.
[c] Co. Litt. 9.
[d] Litt. § 70.
[e] Wright, 87.
[f] *l.* 3. *c.* 15. § 5.

claimed title by other means, might know against whom to bring their actions.

In all well-governed nations some notoriety of this kind has been ever held requisite, in order to acquire and ascertain
[312] the property of lands. In the Roman law *plenum dominium* was not said to subsist, unless where a man had both the *right* and the *corporal possession*; which possession could not be acquired without both an actual intention to possess, and an actual seisin, or entry into the premises, or part of them, in the name of the whole [h]. And even in ecclesiastical promotions, where the freehold passes to the person promoted, corporal possession is required at this day, to vest the property completely in the new proprietor; who, according to the distinction of the canonists [i], acquires the *jus ad rem*, or inchoate and imperfect right, by nomination and institution; but not the *jus in re*, or complete and full right, unless by corporal possession. Therefore in dignities possession is given by instalment; in rectories and vicarages by induction, without which no temporal rights accrue to the minister, though every ecclesiastical power is vested in him by institution. So also even in descents of lands by our law, which are cast on the heir by act of the law itself, the heir has not *plenum dominium*, or full and complete ownership till he has made an actual corporal entry into the lands: for if he dies before *entry* made, *his* heir shall not be entitled to take the possession, but the heir of the person who was last actually seised [k]. It is not therefore only a mere right to enter, but the actual entry that makes a man complete owner; so as to transmit the inheritance to his own heirs: *non jus, sed seisina, facit stipitem.* [l]

Yet, the corporal tradition of lands being sometimes inconvenient, a symbolical delivery of possession was in many

[h] *Nam apiscimur possessionem corpore et animo; neque per se corpore, neque per se animo. Quod autem diximus et corpore et animo, acquirere nos debere possessionem, non utique ita accipiendum est, ut qui fundum possidere velit, omnes glebas circumambulet; sed sufficit quamlibet partem ejus fundi introire.* (*Ff.* 41. 2, 3.) And again: *traditionibus dominia rerum, non nudis pactis, transferuntur.* (*Cod.* 2, 3. 20.)

[i] Decretal, *l.* 3. *t.* 4. *c.* 40.

[k] See pag. 209. 227, 228.

[l] Flet. *l.* 6. *c.* 2. § 2.

cases antiently allowed; by tranferring something near at hand, in the presence of credible witnesses, which by agreement should serve to represent the very thing designed to be conveyed; and an occupancy of this sign or symbol was permitted as equivalent to occupancy of the land itself. Among [313] the Jews we find the evidence of a purchase thus defined in the book of Ruth[m]: "now this was the manner in former "time in Israel, concerning redeeming and concerning "changing, for to confirm all things: a man plucked off his "shoe, and gave it to his neighbour; and this was a testimony "in Israel." Among the antient Goths and Swedes, contracts for the sale of lands were made in the presence of witnesses who extended the cloak of the buyer, while the seller cast a clod of the land into it, in order to give possession; and a staff or wand was also delivered from the vendor to the vendee, which passed through the hands of the witnesses[n]. With our Saxon ancestors the delivery of a turf was a necessary solemnity, to establish the conveyance of lands[o]. And, to this day, the conveyance of our copyhold estates is usually made from the seller to the lord or his steward by delivery of a rod or verge, and then from the lord to the purchasor by re-delivery of the same, in the presence of a jury of tenants.

Conveyances in writing were the last and most refined improvement. The mere delivery of possession, either actual or symbolical, depending on the ocular testimony and remembrance of the witnesses, was liable to be forgotten or misrepresented, and became frequently incapable of proof. Besides, the new occasions and necessities introduced by the advancement of commerce, required means to be devised of charging and encumbering estates, and of making them liable to a multitude of conditions and minute designations for the purposes of raising money, without an absolute sale of the land; and sometimes the like proceedings were found useful in order to make a decent and competent provision for the numerous branches of a family, and for other domestic views. None of which could be effected by a mere, simple, corporal

[m] ch. 4. v. 7.
[n] Stiernhook, *de jure Sueon. l.* 2. *c.* 4.
[o] Hickes, *Dissert. Epistolar.* 85.

transfer of the soil from one man to another, which was principally calculated for conveying an absolute unlimited
[314] dominion. Written deeds were therefore introduced in order to specify and perpetuate the peculiar purposes of the party who conveyed (9); yet still, for a very long series of years, they were never made use of, but in company with the more antient and notorious method of transfer, by delivery of corporal possession.

Livery of seisin, by the common law, is necessary to be made upon every grant of an estate of freehold in hereditaments corporeal, whether of inheritance or for life only. In hereditaments incorporeal it is impossible to be made; for they are not the object of the senses; and in leases for years, or other chattel interests, it is not necessary. In leases for years indeed an actual *entry* is necessary, to vest the estate in the lessee: for the bare lease gives him only a right to enter, which is called his interest in the term, or *interesse termini*: and, when he enters in pursuance of that right, he is then, and not before, in possession of his term, and complete tenant for years [p]. This entry by the tenant himself serves the purpose of notoriety, as well as livery of seisin from the grantor could have done; which it would have been improper to have given in this case, because that solemnity is appropriated to the conveyance of a freehold. And this is one reason why freeholds cannot be made to commence *in futuro*, because they cannot (at the common law) be made but by livery of seisin; which livery, being an actual manual tradition of the land, must take effect *in praesenti*, or not at all [q]. (10)

[p] Co. Litt. 46. [q] See pag. 165.

(9) And by the Statute of Frauds, 29 C. 2. c. 3., instruments in writing are now made necessary to the perfection of all feoffments.

(10) Perhaps the reason is not that of physical necessity stated in the text; because there seems no impossibility of suspending the operation of that which, after all, is but a symbolical delivery, for a certain time, or on a certain condition. But as feoffments with livery were clearly in use before written deeds were common, and as the main object of the livery before the *parce* was *certainty*, we shall find, perhaps, the best reason for the rule in the uncertainty, which would result from a contrary practice. If after livery made to the feoffee, the freehold still remained in the feoffor, the investiture

On the creation of a *freehold* remainder, at one and the same time with a particular estate for years, we have before seen, that at the common law livery must be made to the particular tenant[r]. But if such a remainder be created afterwards, expectant on a lease for years now in being, the livery must not be made to the lessee for years, for then it operates nothing; "*nam quod semel meum est, amplius meum esse non potest*[s]," but it must be made to the remainder-man himself, by consent of the lessee for years; for without his consent [315] no livery of the possession can be given[t]; partly because such forcible livery would be an ejectment of the tenant from his term, and partly for the reasons before given[u] for introducing the doctrine of attornments.

Livery of seisin is either in *deed*, or in *law*. Livery in *deed* is thus performed. The feoffor, lessor, or his attorney, together with the feoffee, lessee, or his attorney, (for this may as effectually be done by deputy or attorney, as by the principals themselves in person (11),) come to the land, or to the house; and there, in the presence of witnesses, declare the contents of the feoffment or lease, on which livery is to be made. And then the feoffor, if it be of land, doth deliver to the feoffee, all other persons being out of the ground, a clod

[r] pag. 167.
[s] Co. Litt. 49.
[t] Co. Litt. 48.
[u] pag. 288.

investiture would rather create, than prevent doubts as to who was actual tenant. The rule, therefore, was so strictly adhered to, that if A granted a term for years to B, with a condition that he should have the fee-simple, if upon a certain day he did such a thing, and gave him livery of seisin; B was not tenant for years with a possible future fee, but he was immediately tenant in fee-simple conditional; the freehold was in him at once, and reverted to A on non-performance of the condition. Litt. sec. 350.

(11) But the attorney, whether of the feoffor or feoffee, must be authorised by deed, in order that it may appear whether the authority be duly pursued. 2 Roll. Ab 8 R. pl. 4, 5.; and it must be executed in the lifetime of both feoffor and feoffee, for if the party who authorised the attorney dies, the authority is at end by that circumstance; and if the other party dies, an authority, if it be to deliver, cannot be executed by a delivery to his heir, and an authority to receive will, of course, be nugatory; for the land to be received not having passed out of the feoffor in his lifetime will have descended to his heir, and so the whole conveyance will be frustrated. Co. Litt. 52. b.

or turf, or a twig or bough there growing, with words to this effect: "I deliver these to you in the name of seisin of all the "lands and tenements contained in this deed." But if it be of a house, the feoffor must take the ring or latch of the door, the house being quite empty, and deliver it to the feoffee in the same form; and then the feoffee must enter alone, and shut to the door, and then open it, and let in the others[w]. If the conveyance or feoffment be of divers lands, lying scattered in one and the same county, then in the feoffor's possession, livery of seisin of any parcel, in the name of the rest, sufficeth for all[x] (12); but if they be in several counties, there must be as many liveries as there are counties. For, if the title to these lands comes to be disputed, there must be as many trials as there are counties, and the jury of one county are no judges of the notoriety of a fact in another. Besides antiently this seisin was obliged to be delivered *coram paribus de vicineto*, before the peers or freeholders of the neighbourhood, who attested such delivery in the body or on the back of the deed; according to the rule of the feodal law[y], *pares debent interesse investiturae feudi, et non alii*: for which this reason
[316] is expressly given; because the peers or vasals of the lord, being bound by their oath of fealty, will take care that no fraud be committed to his prejudice, which strangers might be apt to connive at. And though afterwards the ocular attestation of the *pares* was held unnecessary, and livery might be made before any credible witnesses, yet the trial, in case it was disputed, (like that of all other attestations[z],) was still reserved to the *pares* or jury of the county[a]. Also, if the lands be out on lease, though all lie in the same county, there must be as many liveries as there are tenants: because no livery can be made in this case but by the consent of the particular tenant; and the consent of one will not bind the rest[b].

[w] Co. Litt. 48. West. Symb. 251.
[x] Litt. § 61. 418.
[y] *Feud. l.* 2. *t.* 58.
[z] See pag. 307.
[a] Gilb. 10. 35.
[b] Dyer, 18.

(12) So in rectories and vicarages, induction, which is made usually by giving possession of the church, puts the parson into complete and actual possession of the whole glebe, and temporalities; so that he may maintain trespass or ejectment. *Bulwer* v. *Bulwer*, 2 B. & A. 470.

And in all these cases it is prudent, and usual, to endorse the livery of seisin on the back of the deed, specifying the manner, place, and time of making it; together with the names of the witnesses [c]. And thus much for livery in deed.

LIVERY in *law* is where the same is not made *on* the land, but *in sight of it* only; the feoffor saying to the feoffee, "I "give you yonder land, enter and take possession." Here, if the feoffee enters during the life of the feoffor, it is a good livery, but not otherwise; unless he dares not enter, through fear of his life or bodily harm: and then his continual claim, made yearly, in due form of law, as near as possible to the lands [d], will suffice without an entry [e]. This livery in law cannot however be given or received by attorney, but only by the parties themselves.[f] (13)

2. THE conveyance by *gift*, *donatio*, is properly applied to the creation of an estate-tail, as feoffment is to that of an estate in fee, and lease to that of an estate for life or years. It differs in nothing from a feoffment, but in the nature of the estate passing by it: for the operative words of conveyance in this case are *do* or *dedi* [g]; and gifts in tail are equally imperfect without livery of seisin, as feoffments in fee-simple [h]. And this is the only distinction that Littleton seems to take, [317] when he says [i], "it is to be understood that there is feoffor "and feoffee, donor and donee, lessor and lessee;" *viz.* feoffor is applied to a feoffment in fee-simple, donor to a gift in tail, and lessor to a lease for life, or for years, or at will. In common acceptation gifts are frequently confounded with the next species of deeds: which are,

3. GRANTS, *concessiones*; the regular method by the common law of transferring the property of *incorporeal* heredita-

[c] See Appendix, N° I.
[d] Litt. § 421, &c.
[e] Co. Litt. 254.
[f] *Ibid.* 52.
[g] West. Symbol. 256.
[h] Litt. § 59.
[i] § 57.

(13) For the effect of a feoffment in clearing titles, and destroying contingent remainders, see Sanders on Uses and Trusts, vol. ii. p. 11. 4th edit.

ments, or such things whereof no livery can be had [k]. For which reason all corporeal hereditaments, as lands and houses, are said to lie *in livery*; and the others, as advowsons, commons, rents, reversions, &c. to lie *in grant* [l]. And the reason is given by Bracton [m]: "*traditio*, or livery, *de re corporali* "*propria vel aliena de persona in personam, de manu propria* "*vel aliena, sicut procuratoria, dum tamen de voluntate domini,* "*in alterius manum gratuita translatio. Et nihil aliud est* "*traditio in uno sensu, nisi in possessionem inductio de re* "*corporali; ideo dicitur quod res incorporalis non patitur* "*traditionem, sicut ipsum jus, quod rei sive corpori inhæret;* "*et quia non possunt res incorporales possideri, sed quasi.*" These therefore pass merely by the delivery of the deed. And in signiories or reversions of lands, such grant, together with the attornment of the tenant (while attornments were requisite), were held to be of equal notoriety with, and therefore equivalent to, a feoffment and livery of lands in immediate possession. It therefore differs but little from a feoffment, except in it's subject-matter: for the operative words therein commonly used are *dedi et concessi*, "have given and granted."

4. A LEASE is properly a conveyance of any lands or tenements (usually in consideration of rent or other annual recompence) made for life, for years, or at will, but always for a *less* time than the lessor hath in the premises; for if it be for the *whole* interest, it is more properly an assignment than a lease. The usual words of operation in it are, "de-"mise, grant, and to farm let; *dimisi, concessi, et ad firmam* [318] "*tradidi.*" *Farm*, or *feorme*, is an old Saxon word, signifying provisions [n]: and it came to be used instead of rent or render, because antiently the greater part of rents were reserved in provisions; in corn, in poultry, and the like; till the use of money became more frequent. So that a farmer, *firmarius*, was one who held his lands upon payment of a rent or *feorme*: though at present, by a gradual departure from the original sense, the word *farm* is brought to signify the very estate or lands so held upon farm or rent. By this conveyance an estate for life, for years, or at will, may be

[k] Co. Litt. 9.
[l] *Ibid.* 172.
[m] *l.* 2. *c.* 18.
[n] Spelm. *Gl.* 229.

created, either in corporeal, or incorporeal hereditaments; though livery of seisin is indeed incident and necessary to one species of leases, *viz.* leases for life of corporeal hereditaments; but to no other.

WHATEVER restriction, by the severity of the feodal law, might in times of very high antiquity be observed with regard to leases; yet by the common law, as it has stood for many centuries, all persons seised of any estate might let leases to endure so long as their own interest lasted, but no longer. Therefore tenant in fee-simple might let leases of any duration, for he hath the whole interest; but tenant in tail, or tenant for life, could make no leases which should bind the issue in tail or reversioner: nor could a husband seised *jure uxoris*, make a firm or valid lease for any longer term than the joint lives of himself and his wife, for then his interest expired. Yet some tenants for life, where the fee-simple was in abeyance, might (with the concurrence of such as had the guardianship of the fee) make leases of equal duration with those granted by tenants in fee-simple, such as parsons and vicars with consent of the patron and ordinary °. So also bishops, and deans, and such other sole ecclesiastical corporations as are seised of the fee-simple of lands in their corporate right, might, with the concurrence and confirmation of such persons as the law requires, have made leases for years, or for life, estates in tail or in fee, without any limitation or controul. And corporations aggregate might have [319] made what estates they pleased, without the confirmation of any other person whatsoever. Whereas now, by several statutes, this power, where it was unreasonable, and might be made an ill use of, is restrained; and, where in the other cases the restraint by the common law seemed too hard, it is in some measure removed. The former statutes are called the *restraining*, the latter the *enabling* statute. We will take a view of them all, in order of time.

AND, first, the *enabling* statute, 32 Hen. VIII. c. 28., empowers three manner of persons to make leases, to endure for three lives or one-and-twenty years; which could not do

° Co. Litt. 44.

so before. As first, tenant in tail may by such leases bind his issue in tail, but not those in remainder or reversion. Secondly, a husband seised in right of his wife, in fee-simple or fee-tail, provided the wife joins in such lease, may bind her and her heirs thereby. Lastly, all persons seised of an estate of fee-simple in right of their churches, which extends not to parsons and vicars, may (without the concurrence of any other person) bind their successors. But then there must many requisites be observed, which the statute specifies, otherwise such leases are not binding [p]. 1. The lease must be by indenture; and not by deed poll, or by parol. 2. It must begin from the making, or day of the making, and not at any greater distance of time. 3. If there be any old lease in being, it must be first absolutely surrendered, or be within a year of expiring. 4. It must be *either* for twenty-one years, *or* three lives, and not for both. 5. It must not exceed the term of three lives, or twenty-one years, but may be for a shorter term. 6. It must be of corporeal hereditaments, and not of such things as lie merely in grant; for no rent can be reserved thereout by the common law, as the lessor cannot resort to them to distrein [q]. 7. It must be of lands and
[320] tenements most commonly letten for twenty years past; so that if they have been let for above half the time (or eleven years out of the twenty) either for life, for years, at will, or by copy of court roll, it is sufficient. 8. The most usual and customary feorm or rent, for twenty years past, must be reserved yearly on such lease. 9. Such leases must not be made without impeachment of waste. These are the guards, imposed by the statute (which was avowedly made for the security of farmers and the consequent improvement of tillage) to prevent unreasonable abuses, in prejudice of the issue, the wife, or the successor, of the reasonable indulgence here given.

Next follows, in order of time, the *disabling* or *restraining* statute, 1 Eliz. c. 19., (made entirely for the benefit of

[p] Co. Litt. 44.

[q] But now by the statute 5 Geo. III. c. 17. a lease of tithes or other incorporeal hereditaments, alone, may be granted by any bishop or any such ecclesiastical or eleemosynary corporation, and the successor shall be entitled to recover the rent by an action of debt; which (in case of a freehold lease) he could not have brought at the common law.

the successor,) which enacts, that all grants by archbishops and bishops, (which include even those confirmed by the dean and chapter; the which, however long or unreasonable, were good at common law,) other than for the term of one-and-twenty years or three lives from [such time as any such lease, grant, or assurance shall begin] or without reserving the usual rent, shall be void. Concurrent leases, if confirmed by the dean and chapter, are held to be within the exception of this statute, and therefore valid; provided they do not exceed (together with the lease in being) the term permitted by the act[r]. (13) But by a saving ex-

[r] Co. Litt. 45.

(13) The principle of concurrent leases is well explained in the admirable article on leases in Bacon's Abr. E. Rule 3.—Suppose the bishop alone under the 32 H. 8. to have made a lease for twenty-one years, and to be desirous of making a fresh lease for years, at any period before the expiration of the lease exceeding a year. The enabling statute will not in such case apply; but as that takes from him no powers which he had at common law, he might still, with the confirmation of the dean and chapter, make a lease in reversion for any period of time, but for the statute of Elizabeth. That, however, imposes upon all his leases, whether made under the statute of Henry or at common law, this restraint, that they must not exceed three lives, or twenty-one years from the time at which they shall begin. He must, therefore, observe this restriction, and if he does so, (the lease being confirmed by the dean and chapter, as being a lease at common law,) the grant is valid; for as it has only twenty-one years to run in the whole, it is quite immaterial to the successor, for how much of that time the old lease is also in being—both are consuming at the same time, and the second lease has only an existence as against him from the expiration of the first; at no period is there an interest of more than twenty-one years in lease.

But though there may be thus two leases for years in existence at once, yet there cannot be two leases for lives, or a lease for lives and a lease for years running together. The reasons assigned for this are not so simple, or satisfactory. 1st, It is said that the statute of Elizabeth avoids all leases "other than for the term of twenty-one years or three lives;" that this is in the disjunctive, and that the statute never meant that both kinds of leases should be in being against the successor at the same time. 2d, If the lease for lives in reversion on the lease for years were allowed, the lessees under it, having the reversion, would be entitled to the rent reserved on the first lease, and yet there would be no adequate remedy for the bishop's successor to recover the rent reserved on the second; distrein he could not, for the first lessees are in possession, and their possession is a pledge only for the first rent; he could bring no assise, because he has never had seisin of the rent; nor an action of debt, because the lease was freehold, (this

pressly made, this statute of 1 Eliz. did not extend to grants made by any bishop to the crown; by which means queen Elizabeth procured many fair possessions to be made over to her by the prelates, either for her own use or with intent to be granted out again to her favourites, whom she thus gratified without any expense to herself. To prevent which * for the future, the statute 1 Jac. I. c. 3. extends the prohibition to grants and leases made to the king, as well as to any of his subjects.

Next comes the statute 13 Eliz. c. 20. explained and enforced by the statutes 14 Eliz. c. 11. & 14., 18 Eliz. c. 11., and 43 Eliz. c. 9., which extend the restrictions laid by the
321] last-mentioned statute on bishops, to certain other inferior corporations, both sole and aggregate. From laying all which together we may collect, that all colleges, cathedrals, and other ecclesiastical or eleemosynary corporations, and all parsons and vicars, are restrained from making any leases of their lands, unless under the following regulations: 1. They must not exceed twenty-one years, or three lives, from the making. 2. The accustomed rent, or more, must be

* 11 Rep. 71.

---

last reason ceases to be of any weight since the statutes 8 Ann. c. 14. s. 4. and 5 G. 3. c. 17.), and though upon the expiration of the lease for years, the whole rent then in arrear on the lease for lives might be distreined for, yet the first lease might outlast the second, and then the successor would have nothing. 3d, If the first lease be for lives, and the second for years, though an action of debt would lie for the rent of the second, during the continuance of the first, yet no distress could be taken, and supposing the lessee for years to be insolvent, and his lease to expire before that of the lease for lives, the bishop would have no efficient remedy.

I have thus stated the arguments for one kind of concurrent leases, and against the other, but perhaps the reader will agree that both kinds are in evasion of the statute, and that much of the reasoning against the latter will apply with equal force against the former. All that is drawn from the words, or the intent of the statute, clearly will; and if the first lessee for years attorned to the second, the second would thereby become a reversioner, and as such entitled to the rent of the first, and to distrein for it, while the bishop would lose his present right of distress, and have to rely only on his action of debt or covenant so long as the first lease endured. And as attornment is now made unnecessary in all cases, this inconvenience appears to have become inevitable.

yearly reserved thereon. 3. Houses in corporations, or market towns, may be let for forty years, provided they be not the mansion-houses of the lessors, nor have above ten acres of ground belonging to them; and provided the lessee be bound to keep them in repair; and they may also be aliened in fee-simple for lands of equal value in recompence. 4. Where there is an old lease in being, no concurrent lease shall be made, unless where the old one will expire within three years. 5. No lease (by the equity of the statute) shall be made without impeachment of waste [t]. 6. All bonds and covenants tending to frustrate the provisions of the statutes of 13 & 18 Eliz. shall be void.

Concerning these restrictive statutes there are two observations to be made; first, that they do not by any construction enable any persons to make such leases as they were by common law disabled to make. Therefore a parson, or vicar, though he is restrained from making longer leases than for twenty-one years or three lives, even *with* the consent of patron and ordinary, yet is not enabled to make any lease at all, so as to bind his successor *without* obtaining such consent [u]. Secondly, that though leases contrary to these acts are declared void, yet they are good against the *lessor* during his life, if he be a sole corporation; and are also good against an aggregate corporation so long as the head of it lives, who is presumed to be the most concerned in interest. For the act was intended for the benefit of the successor only; and no man shall make an advantage of his own wrong [w]. (14)

[t] Co. Litt. 45.
[u] *Ibid.* 44.
[w] Co. Litt. 45.

(14) Although these statutes do not in terms specify that the premises demised must have been commonly letten, yet Lord Coke lays it down as a general rule, that in leases under the exceptions of the restraining statutes, the conditions of the enabling statute must be complied with; and in this particular instance, as the 13 Eliz. requires that the *accustomed* rent or more should be reserved, the conclusion is obvious, that the premises must have been commonly in lease before. See *Doe* v. *Lord Yarborough*, 1 Bing. Rep. 24. But the 57 G. 3. c. 99. by s. 32., avoids all contracts for the letting, for any period, of the house of residence on any benefice, or the buildings, gardens, &c. necessary for the convenient occupation of the same, to which any spiritual person shall be ordered by his bishop to proceed,

There is yet another restriction with regard to college leases, by statute 18 Eliz. c. 6. which directs, that one-third of the old rent, then paid, should for the future be reserved in wheat or malt, reserving a quarter of wheat for each 6*s.* 8*d.*; or a quarter of malt for every 5*s.*; or that the lessees should pay for the same according to the price that wheat and malt should be sold for, in the market next adjoining to the respective colleges on the market day before the rent becomes due. This is said [x] to have been an invention of lord treasurer Burleigh, and Sir Thomas Smith, then principal secretary of State; who observing how greatly the value of money had sunk, and the price of all provisions risen, by the quantity of bullion imported from the new-found Indies, (which effects were likely to increase to a greater degree,) devised this method for upholding the revenues of colleges. Their foresight and penetration has in this respect been very apparent: for, though the rent so reserved in corn was at first but one-third of the whole rent, or half what was still reserved in money, yet now the proportion is nearly inverted: and the money arising from corn rents is, *communibus annis*, almost double to the rents reserved in money.

The leases of beneficed clergymen are farther restrained, in case of their non-residence, by statutes 13 Eliz. c. 20., 14 Eliz. c. 11., 18 Eliz. c. 11., and 43 Eliz. c. 9., which direct, that if any beneficed clergyman be absent from his cure above fourscore days in any one year, he shall not only forfeit one year's profit of his benefice, to be distributed amongst the poor of the parish; but that all leases made by him, of the profits of such benefice, and all covenants and agreements of like nature, shall cease and be void: except in the case of licensed pluralists, who are allowed to demise the living, on which they are non-resident, to their curates only: provided such curates do not absent themselves above forty days

[x] Strype's Annals of Eliz.

---

and reside in, or which the bishop shall have assigned as a residence for the curate. The same section provides for a summary ejectment of the tenant who continues to hold over after notice, and imposes a penalty of 40*s.* a day for such holding over.

in any one year. And thus much for leases, with their several enlargements and restrictions [y]. (15)

5. An *exchange* is a mutual grant of equal interests, the one in consideration of the other. The word "exchange," is so individually requisite and appropriated by law to this case, that it cannot be supplied by any other word, or expressed by any circumlocution [z]. The estates exchanged must be equal in quantity [a]; not of *value*, for that is immaterial, but of *interest*; as fee-simple for fee simple, a lease for twenty years for a lease for twenty years, and the like. And the exchange may be of things that lie either in grant or in livery [b]. But no livery of seisin even in exchanges of freehold, is necessary to perfect the conveyance [c]: for each party stands in the place of the other, and occupies his right, and each of them hath already had corporal possession of his own land. (16) But entry must be made on both sides: for, if either party die before entry, the exchange is void, for want of sufficient notoriety [d]. And so also, if two parsons by consent of patron and ordinary, exchange their preferments; and the one is presented, instituted, and inducted, and the other is presented, and instituted, but dies before induction; the former shall not keep his new benefice, because the exchange was not completed, and therefore he shall return back to his own [e]. For if, after an exchange of lands or other

[y] For the other learning relating to leases, which is very curious and diffusive, I must refer the student to 3 Bac. Abridg. 295. (title, *leases and terms for years*,) where the subject is treated in a perspicuous and masterly manner; being supposed to be extracted from a manuscript of sir Geoffrey Gilbert.

[z] Co. Litt. 50, 51.
[a] Litt. § 64, 65.
[b] Co. Litt. 50.
[c] Litt. § 62.
[d] Co. Litt. 50.
[e] Perk. § 288.

(15) These statutes, so far as they relate to this subject, are repealed by the statute of G. 3. last mentioned.

(16) Though no livery of seisin was necessary, yet if the lands exchanged were in different counties, a deed was necessary for the conveyance, as of course it was always where the things exchanged lay in grant only. But now by the statute of Frauds, an instrument in writing will be necessary.

From the words of the text it might be supposed, that a lease of twenty years could only be exchanged for a lease of precisely the same duration; but as the quantity of interest is the same in all terms for years, whatever be the number, that circumstance is quite immaterial.

hereditaments, either party be evicted of those which were taken by him in exchange, through defect of the other's title; he shall return back to the possession of his own, by virtue of the implied warranty contained in all exchanges [f].

6. A PARTITION is when two or more joint-tenants, coparceners, or tenants in common, agree to divide the lands
[324] so held among them in severalty, each taking a distinct part. Here, as in some instances there is a unity of interest and in all a unity of possession, it is necessary that they all mutually convey and assure to each other the several estates which they are to take and enjoy separately. By the common law, coparceners, being compellable to make partition, might have made it by parol only; but joint-tenants and tenants in common must have done it by deed: and in both cases the conveyance must have been perfected by livery of seisin [g]. (17) And the statutes of 31 Hen. VIII. c. 1. and 32 Hen. VIII. c. 32. made no alteration in this point. But the statute of frauds, 29 Car. II. c. 3. hath now abolished this distinction, and made a deed in all cases necessary. (18)

THESE are the several species of *primary* or *original* conveyances. Those which remain are of the *secondary* or *derivative* sort: which presuppose some other conveyance precedent, and only serve to enlarge, confirm, alter, restrain, restore, or transfer the interest granted by such original conveyance. As,

7. RELEASES; which are a discharge or conveyance of a man's right in lands or tenements, to another that hath some

[f] pag. 300. [g] Litt. § 250. Co. Litt. 169.

(17) In the case of joint-tenants, it is obvious that livery of seisin cannot be necessary, and that if made, it would operate nothing; for each "joint-tenant is already seised of the whole: and therefore Lord Coke says, joyntenants may release, but not infeoffe, because the freehold is joynt." Co. Litt. 200. b.

(18) Not a deed, but a writing only, in cases where no deed was necessary before.

As to partition, see ante, p. 185, n.

former estate in possession. (19) The words generally used therein, are "remised, released, and for ever quit-claimed [h]." And these releases may enure either, 1. By way of *enlarging an estate*, or *enlarger l'estate*: as, if there be tenant for life or years, remainder to another in fee, and he in remainder releases all his right to the particular tenant and his heirs, this gives him the estate in fee [i]. But in this case the relessee must be in *possession* of some estate, for the release to work upon; for if there be lessee for years, and before he enters and is in possession, the lessor releases to him all his right in the reversion, such release is void for want of possession in the relessee [k]. 2. By way of *passing an estate*, or *mitter l'estate*: as when one or two coparceners releaseth all her right to the other, this passeth the fee-simple of the whole [l]. [325 And in both these cases there must be a privity of estate between the relessor and relessee [m]: that is, one of their estates must be so related to the other, as to make but one and the same estate in law. 3. By way of *passing a right*, or *mitter le droit*: as if a man be disseised, and releaseth to his disseisor all his right, hereby the disseisor acquires a new right, which changes the quality of his estate, and renders that lawful which before was tortious or wrongful [n]. 4. By way of *extinguishment*: as if my tenant for life makes a lease to A for life, remainder to B and his heirs, and I release to A; this extinguishes my right to the reversion, and shall enure to the advantage of B's remainder as well as of A's particular estate. [o] 5. By way of *entry* and *feoffment*: as if there be two joint disseisors, and the disseisee releases to one of them, he shall be sole seised, and shall keep out his former companion: which is the same in effect as if the disseisee had entered,

[h] Litt. § 445.
[i] *Ibid.* § 465.
[k] *Ibid.* § 465.
[l] Co. Litt. 273.
[m] Co. Litt. 272, 273.
[n] Litt. § 466.
[o] *Ibid.* § 470.

(19) Actual possession of the land is only necessary, when there is no estate in being, which precedes the lesser estate intended to be enlarged; but where that is the case, a vested interest is sufficient to give the release operation. As if there be tenant for life, remainder for life, with the reversion in fee, he in reversion may release to him in remainder, and so pass a fee.

and thereby put an end to the disseisin, and afterwards had enfeoffed one of the disseisors in fee[p]. And hereupon we may observe, that when a man has in himself the possession of lands, he must at the common law convey the freehold by feoffment and livery; which makes a notoriety in the country: but if a man has only a right or a future interest, he may convey that right or interest by a mere release to him that is in possession of the land: for the occupancy of the relessee is a matter of sufficient notoriety already.

8. A CONFIRMATION is of a nature nearly allied to a release. Sir Edward Coke defines it[q] to be a conveyance of an estate or right *in esse*, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased: and the words of making it are these, "have given, granted, ratified, approved, and confirmed[r]." An instance of the first branch of the definition is, if tenant for life leaseth for forty years, and dieth during that term; here the lease for years is
[326] voidable by him in reversion: yet, if he hath confirmed the estate of the lessee for years, before the death of tenant for life, it is no longer voidable but sure[s]. The latter branch, or that which tends to the increase of a particular estate, is the same in all respects with that species of release, which operates by way of enlargement.

9. A SURRENDER, *sursumredditio*, or rendering up, is of a nature directly opposite to a release; for, as that operates by the greater estate's descending upon the less, a surrender is the falling of a less estate into a greater. It is defined[t] a yielding up of an estate for life or years to him that hath the immediate reversion or remainder, wherein the particular estate may merge or drown, by mutual agreement between them. It is done by these words, "hath surrendered, granted, "and yielded up." The surrenderor must be in possession[u]; and the surrenderee must have a higher estate, in which the estate surrendered may merge; therefore tenant for life cannot surrender to him in remainder for years[w]. In a surrender

[p] Co. Litt. 278.
[q] 1 Inst. 295.
[r] Litt. § 515. 531.
[s] *Ibid.* § 516.
[t] Co. Litt. 337.
[u] *Ibid.* 338.
[w] Perk. § 589.

there is no occasion for livery of seisin[x]; for there is a privity of estate between the surrenderor and the surrenderee; the one's particular estate and the other's remainder are one and the same estate; and livery having been once made at the creation of it, there is no necessity for having it afterwards. And, for the same reason, no livery is required on a release or confirmation in fee to tenant for years or at will, though a freehold thereby passes: since the reversion of the lessor, or confirmor, and the particular estate of the relessee, or confirmee, are one and the same estate; and where there is already a possession, derived from such a privity of estate, any farther delivery of possession would be vain and nugatory[y].

10. An *assignment* is properly a transfer, or making over to another, of the right one has in *any* estate; but it is usually applied to an estate for life or years. And it differs from a lease only in this: that by a lease one grants an interest less than his own, reserving to himself a reversion; in [327] assignments he parts with the whole property, and the assignee stands to all intents and purposes in the place of the assignor. (20)

[x] Co. Litt. 50. [y] Litt. § 460.

(20) It would be more correct to call an assignment the transfer of one's interest, as a bare right (being a chose in action) cannot by law be assigned. But every vested interest may, though the enjoyment of it be postponed to some future period; and in equity, the assignment even of a contingent interest, may be sustained. Fearne, Ex. Dev. 550, 7th edition.

By the assignment, the assignee does not stand to all intents and purposes in the place of the assignor; for where a lessee assigns his lease, he still remains liable on his covenants to the lessor, because he stood bound by his personal contract, as well as by reason of his possession of the premises, and he does not become discharged from the former, because he has quitted the latter. But between the lessor and the assignee of the lessee there is no other privity than that which results from possession of the estate; his obligations, therefore, are only co-extensive with his interest, and if he assigns over to another, he is discharged from all future liability; and this he may do to a beggar, or a person leaving the kingdom, who never takes possession. *Taylor* v. *Skum*, 1 B. & P. 21.

It is quite consistent with this, however, that his liability should commence upon acceptance of the assignment, and before actual entry; for it is the former which vests the interest in him. *Williams* v. *Bosanquet*, 1 B. & B. 238.

For more on assignees, see Vol. III. p. 158. n. 10.

11. A DEFEAZANCE is a collateral deed, made at the same time with a feoffment or other conveyance, containing certain conditions, upon the performance of which the estate then created may be *defeated*[a] or totally undone. And in this manner mortgages were in former times usually made; the mortgagor enfeoffing the mortgagee, and he at the same time executing a deed of defeazance, whereby the feoffment was rendered void on repayment of the money borrowed at a certain day. And this, when executed at the same time with the original feoffment, was considered as part of it by the antient law[a]; and, therefore only, indulged: no subsequent secret revocation of a solemn conveyance, executed by livery of seisin, being allowed in those days of simplicity and truth; though, when uses were afterwards introduced, a revocation of such uses was permitted by the courts of equity. But things that were merely executory, or to be completed by matter subsequent, (as rents, of which no seisin could be had till the time of payment;) and so also annuities, conditions, warranties, and the like, were always liable to be recalled by defeazances made subsequent to the time of their creation[b].

II. THERE yet remain to be spoken of some few conveyances, which have their force and operation by virtue of the *statute of uses*.

USES and *trusts* are in their original of a nature very similar, or rather exactly the same: answering more to the *fidei-commissum* than the *usus fructus* of the civil law: which latter was the temporary right of using a thing, without having the ultimate property, or full dominion of the substance[c]. But the *fidei-commissum*, which usually was created by will, was the disposal of an inheritance to one, in confidence that he
[328] should convey it or dispose of the profits at the will of another. And it was the business of a particular magistrate, the *praetor fidei commissarius*, instituted by Augustus, to enforce the observance of this confidence[d]. So that the right thereby given was looked upon as a vested right, and entitled to a remedy from a court of justice: which occasioned that

[a] From the French verb *defaire*, infectum reddere.

[a] Co. Litt. 236.

[b] Co. Litt. 237.

[c] *Ff.* 7. 1. 1.

[d] *Inst.* 2. *tit.* 23.

known division of rights by the Roman law into *jus legitimum*, a legal right, which was remedied by the ordinary course of law; *jus fiduciarium*, a right in trust, for which there was a remedy in conscience; and *jus precarium*, a right in courtesy, for which the remedy was only by entreaty or request[e]. In our law, a use might be ranked under the rights of the second kind; being a confidence reposed in another who was tenant of the land, or *terre-tenant*, that he should dispose of the land according to the intentions of *cestuy que usé*, or him to whose use it was granted, and suffer him to take the profits[f]. As, if a feoffment was made to A and his heirs, to the use of (or in trust for) B and his heirs; here at the common law A the *terre-tenant*, had the legal property and possession of the land, but B, the *cestuy que use*, was in conscience and equity to have the profits and disposal of it.

THIS notion was transplanted into England from the civil law, about the close of the reign of Edward III.[g], by means of the foreign ecclesiastics; who introduced it to evade the statutes of mortmain, by obtaining grants of lands, not to their religious houses directly, but to *the use of* the religious houses[h]: which the clerical chancellors of those times held to be *fidei-commissa*, and binding in conscience; and therefore assumed the jurisdiction which Augustus had vested in his *praetor*, of compelling the execution of such trusts in the court of chancery. And, as it was most easy to obtain such grants from dying persons, a maxim was established, that though by law the lands themselves were not devisable, yet if a testator had enfeoffed another to his own use, and so was possessed of the use only, such use was devisable by [329] will. But we have seen[i] how this evasion was crushed in it's infancy, by statute 15 Ric. II. c. 5., with respect to religious houses.

YET, the idea being once introduced, however fraudulently, it afterwards continued to be often innocently, and sometimes

[e] *Ff.* 43. 26. 1. Bacon on Uses, 8vo. 306.

[f] Plowd. 352.

[g] Stat. 50 Edw. III. c. 6. 1 Ric. II. c. 9. 1 Rep. 139.

[h] See page 271.

[i] pag. 272.

as the intention of the parties was the leading principle in this species of property, any instrument declaring that intention was allowed to be binding in equity. But *cestuy que use* could not at common law aliene the legal interest of the lands, without the concurrence of his feoffee[z]; to whom he was accounted by law to be only tenant at sufferance[a]. 5. Uses were not liable to any of the feodal burthens; and particularly did not escheat for felony or other defect of blood; for escheats, *&c.* are the consequence of *tenure*, and uses are *held* of nobody: but the land itself was liable to escheat, whenever the blood of the feoffee to uses was extinguished by crime or by defect; and the lord (as was before observed) might hold it discharged of the use[b]. 6. No wife could be endowed, or husband have his curtesy, of a use[c]: for no trust was declared for their benefit, at the original grant of the estate. (22) And therefore it became customary, when most estates were put in use, to settle before marriage some joint estate to the use of the husband and wife for their lives; which was the original of modern jointures[d]. 7. A use could not be extended by writ of *elegit*, or other legal process, for the debts of *cestuy que use*[e]. For, being merely a creature of equity, the common law, which looked no farther than to the person actually seised of the land, could award no process against it.

It is impracticable, upon our present plan, to pursue the doctrine of uses through all the refinements and niceties which the ingenuity of the times (abounding in subtile disquisitions) deduced from this child of the imagination, when once a departure was permitted from the plain simple rules of property established by the antient law. These principal outlines will be fully sufficient to shew the ground of lord Bacon's complaint[f], that this course of proceeding "was "turned to deceive many of their just and reasonable rights.

[z] Stat. 1 Ric. III. c. 1.
[a] Bro. *Abr. ibid.* 23.
[b] Jenk. 190.
[c] 4 Rep. 1. 2 And. 75.
[d] See pag. 137.
[e] Bro. *Abr. tit. executions*, 90.
[f] Use of the law, 153.

(22) A more simple reason seems to be, that neither the husband in the first case, nor the wife in the second, had had seisin of the lands; and seisin is necessary both to dower and curtesy. See ante, pp. 137. 126.

"A man, that had cause to sue for land, knew not against "whom to bring his action, nor who was the owner of it. [332] "The wife was defrauded of her thirds; the husband of being "tenant by curtesy; the lord of his wardship, relief, heriot, "and escheat; the creditor of his extent for debt; and the "poor tenant of his lease." To remedy these inconveniences abundance of statutes were provided, which made the lands liable to be extended by the creditors of *cestuy que use*[g], allowed actions for the freehold to be brought against him if in the actual pernancy or enjoyment of the profits[h]; made him liable to actions of waste[i]; established his conveyances and leases made without the concurrence of his feoffees[k]; and gave the lord the wardship of his heir, with certain other feodal perquisites[l].

THESE provisions all tended to consider *cestuy que use* as the real owner of the estate; and at length that idea was carried into full effect by the statute 27 Hen. VIII. c. 10. which is usually called the *statute of uses*, or, in conveyances and pleadings, the statute *for transferring uses into possession*. The hint seems to have been derived from what was done at the accession of king Richard III.; who, having, when duke of Gloucester, been frequently made a feoffee to uses, would upon the assumption of the crown (as the law was then understood) have been entitled to hold the lands discharged of the use. But to obviate so notorious an injustice, an act of parliament was immediately passed[m], which ordained, that where he had been so enfeoffed jointly with other persons, the land should vest in the other feoffees, as if he had never been named; and that, where he stood solely enfeoffed, the estate itself should vest in *cestuy que use* in like manner as he had the use. And so the stat. of Henry VIII., after reciting the various inconveniences before mentioned, and many others, enacts, that "where any person shall be *seised* of lands, *&c.* "to the use, confidence, or trust of any other person or body "politic, the person or corporation entitled to the use in fee- [333]

[g] Stat. 50 Edw. III. c. 6. 2 Ric. II. sess. 2. c. 3. 19 Hen. VII. c. 15.

[h] Stat. 1 Ric. II. c. 9. 4 Hen. IV. c. 7. 11 Hen. VI. c. 3. 1 Hen. VII. c. 1.

[i] Stat. 11 Hen. VI. c. 5.

[k] Stat. 1 Ric. III. c. 1.

[l] Stat. 4 & 5 Hen. VII. c. 17. 19 Hen. VII. c. 15.

[m] 1 Ric. III. c. 5.

"simple, fee-tail, for life, or years, or otherwise, shall from "thenceforth stand and be seised or possessed of the land, *&c.* "of and in the like estates as they have in the use, trust, or "confidence; and that the estate of the person so seised to "uses shall be deemed to be in him or them that have the "use, in such quality, manner, form, and condition, as they "had before in the use." The statute thus *executes* the use, as our lawyers term it; that is, it conveys the possession to the use, and transfers the use into possession; thereby making *cestuy que use* complete owner of the lands and tenements, as well at law as in equity.

The statute having thus not abolished the conveyance to uses, but only annihilated the intervening estate of the feoffee, and turned the interest of *cestuy que use* into a legal instead of an equitable ownership; the courts of common law began to take cognizance of uses, instead of sending the party to seek his relief in chancery. And, considering them now as merely a mode of conveyance, very many of the rules before established in equity were adopted with improvements by the judges of the common law. The same persons only were held capable of being seised to a use, the same considerations were necessary for raising it, and it could only be raised of the same hereditaments as formerly. But as the statute, the instant it was raised, converted it into an actual possession of the land, a great number of the incidents, that formerly attended it in it's fiduciary state, were now at an end. The land could not escheat or be forfeited by the act or defect of the feoffee, nor be aliened to any purchasor discharged of the use, nor be liable to dower or curtesy on account of the seisin of such feoffee; because the legal estate never rests in him for a moment, but is instantaneously transferred to *cestuy qui use* as soon as the use is declared. And, as the use and the land were now convertible terms, they became liable to dower, curtesy, and escheat, in consequence of the seisin of *cestuy que use*, who was now become the *terre-tenant* also; and they likewise were no longer devisable by will.

[334] The various necessities of mankind induced also the judges very soon to depart from the rigour and simplicity of the rules of the common law, and to allow a more minute and complex

construction upon conveyances to uses than upon others. Hence it was adjudged, that the use need not always be executed the instant the conveyance is made: but, if it cannot take effect at that time, the operation of the statute may wait till the use shall arise upon some future contingency, to happen within a reasonable period of time; and in the meanwhile the antient use shall remain in the original grantor: as when lands are conveyed to the use of A. and B,, after a marriage shall be had between them [n], or to the use of A. and his heirs till B. shall pay him a sum of money, and then to the use of B. and his heirs [o]. Which doctrine, when devises by will were again introduced, and considered as equivalent in point of construction to declarations of uses, was also adopted in favour of *executory devises* [p]. But herein these, which are called *contingent* or *springing* uses, differ from an executory devise; in that there must be a person seised to such uses at the time when the contingency happens, else they can never be executed by the statute; and therefore if the estate of the feoffee to such use be destroyed by alienation or otherwise, before the contingency arises, the use is destroyed for ever [q]: whereas by an executory devise the freehold itself is transferred to the future devisee. And, in both these cases, a fee may be limited to take effect after a fee [r]; because, though that was forbidden by the common law in favour of the lord's escheat, yet when the legal estate was not extended beyond one fee-simple, such subsequent uses (after a use in fee) were before the statute permitted to be limited in equity; and then the statute executed the legal estate in the same manner as the use before subsisted. It was also held, that a use, though executed, may change from one to another by circumstances *ex post facto* [s]; as, if A. makes a feoffment to the use of his [335] intended wife and her eldest son for their lives, upon the marriage the wife takes the whole use in severalty; and upon the birth of a son, the use is executed jointly in them both [t]. This is sometimes called a *secondary*, sometimes a *shifting* use. And, whenever the use limited by the deed expires, or cannot vest, it returns back to him who raised it, after such expiration,

[n] 2 Roll. Abr. 791. Cro. Eliz. 439.
[o] Bro. *Abr. tit. Feoffm. al uses*, 30.
[p] See pag. 173.
[q] 1 Rep. 134. 138. Cro. Eliz. 439.
[r] Pollexf. 78. 10 Mod. 423.
[s] Bro. *Abr. tit. Feoffm. al uses*, 30.
[t] Bacon of Uses, 351.

or during such impossibility, and is styled a *resulting* use. As, if a man makes a feoffment to the use of his intended wife for life, with remainder to the use of her first-born son in tail; here, till he marries, the use results back to himself; after-marriage, it is executed in the wife for life: and, if she dies without issue, the whole results back to him in fee [u]. It was likewise held, that the uses originally declared may be revoked at any future time, and new uses be declared of the land, provided the grantor reserved to himself such a power at the creation of the estate; whereas the utmost that the common law would allow, was a deed of defeazance coeval with the grant itself, and therefore esteemed a part of it, upon events specially mentioned [w]. And, in case of such a revocation, the old uses were held instantly to cease, and the new ones to become executed in their stead [x]. And this was permitted, partly to indulge the convenience, and partly the caprice of mankind; who (as lord Bacon observes [y]) have always affected to have the disposition of their property revocable in their own time, and irrevocable ever afterwards.

By this equitable train of decisions in the courts of law the power of the court of chancery over landed property was greatly curtailed and diminished. But one or two technical scruples, which the judges found it hard to get over, restored it with tenfold increase. They held, in the first place, that "no use could be limited on a use [z];" and that when a man bargains and sells his lands for money, which raises a use by implication to the bargainee, the limitation of a farther use
[336] to another person is repugnant, and therefore void [a]. And therefore on a feoffment to A. and his heirs, to the use of B. and his heirs, in trust for C. and his heirs, they held that the statute executed only the first use, and that the second was a mere nullity: not adverting, that the instant the first use was executed in B., he became seised to the use of C., which second use the statute might as well be permitted to execute as it did the first; and so the legal estate might be instantaneously transmitted down through a hundred uses upon

[u] Bacon of Uses, 350. 1 Rep. 120.
[w] See pag. 327.
[x] Co. Litt. 237.
[y] On Uses, 316.
[z] Dyer, 155.
[a] 1 And. 37. 186.

uses, till finally executed in the last *cestuy que use*. Again; as the statute mentions only such persons as were *seised* to the use of others, this was held not to extend to terms of years, or other chattel interests, whereof the termor is not *seised* but only *possessed* [b]; and therefore if a term of one thousand years be limited to A., to the use of (or in trust for) B., the statute does not execute this use, but leaves it as at common law [c]. And lastly, (by more modern resolutions,) where lands are given to one and his heirs, in trust to receive and pay over the profits to another, this use is not executed by the statute; for the land must remain in the trustee to enable him to perform the trust [d]. (23)

Of the two more antient distinctions the courts of equity quickly availed themselves. In the first case it was evident, that B. was never intended by the parties to have any beneficial interest; and in the second, the *cestuy que use* of the term was expressly driven into the court of chancery to seek his remedy; and therefore that court determined, that though these were not *uses* which the statute could execute, yet still they were *trusts* in equity, which in conscience ought to be performed [e]. To this the reason of mankind assented, and the doctrine of uses was revived, under the denomination of *trusts*; and thus, by this strict construction of the courts of law, a statute made upon great deliberation, and introduced in the most solemn manner, has had little other effect than to make a slight alteration in the formal words of a conveyance [f].

However, the courts of equity, in the exercise of this [337] new jurisdiction, have wisely avoided in a great degree those mischiefs which made uses intolerable. The statute of frauds, 29 Car. II. c. 3., having required that every declaration, as-

[b] Bacon law of Uses, 335. Jenk. 244.
[c] Poph. 76. Dyer, 369.
[d] 1 Eq. Cas. Abr 383, 384.
[e] 1 Hal. P. C. 248.
[f] Vaugh. 50. 1 Atk. 591.

(23) This case, which is merely put as an instance, may perhaps be doubted, as here stated, and certainly the citation from the Equity Cases Abridged, does not prove it. But the general principle is correctly laid down for determining whether the use be executed or not, namely, the necessity of the legal estate remaining in the trustee for the due performance of the trust.

signment, or grant of any trust in lands or hereditaments, (except such as arise from implication or construction of law,) shall be made in writing signed by the party, or by his written will: the courts now consider a trust-estate (either when expressly declared or resulting by such implication) as equivalent to the legal ownership, governed by the same rules of property, and liable to every charge in equity, which the other is subject to in law: and by a long series of uniform determinations, for now near a century past, with some assistance from the legislature, they have raised a new system of rational jurisprudence, by which trusts are made to answer in general all the beneficial ends of uses, without their inconvenience or frauds. The trustee is considered as merely the instrument of conveyance, and can in no shape affect the estate, unless by alienation for a valuable consideration to a purchasor without notice [g]; which, as *cestuy que use* is generally in possession of the land, is a thing that can rarely happen. The trust will descend, may be aliened, is liable to debts, to executions on judgments, statutes, and recognizances, (by the express provision of the statute of frauds,) to forfeiture, to leases, and other incumbrances, nay, even to the curtesy of the husband, as if it was an estate at law. It has not yet indeed been subjected to dower, more from a cautious adherence to some hasty precedents [h], than from any well-grounded principle. It hath also been held not liable to escheat to the lord, in consequence of attainder or want of heirs [i]: because the trust could never be intended for his benefit. But let us now return to the statute of uses (2).

[g] 2 Freem. 43.
[h] 1 Chanc. Rep. 254. 2 P. Wms. 700.
[i] Hard. 494. Burgess and Wheat, Hil. 32 Geo. II. in Canc.

---

(24) The enumeration which is given in this paragraph of the difference between trusts since the statute, and uses before, is an answer to the observation at the end of the preceding paragraph. Upon this Mr. Sanders remarks, that the observation of Lord Hardwicke, that the statute of uses "has had no other effect, than to add, at most, three words to a conveyance," is not substantially correct; for by extinguishing the fiduciary existence of the use, the statute has, in effect, been the occasion of raising a system of equity, which Lord Mansfield calls "noble, rational, and uniform," in the place of a system at once unjust and inconvenient. "Trusts," says his lordship, "are made to answer the exigencies of families, and all

THE only service, as was before observed, to which this statute is now consigned, is in giving efficacy to certain new and secret species of conveyances; introduced in order to render transactions of this sort as private as possible, and to save the trouble of making livery of seisin, the only antient [338] conveyance of corporal freeholds; the security and notoriety of which public investiture abundantly overpaid the labour of going to the land, or of sending an attorney in one's stead. But this now has given way to

12. A TWELFTH species of conveyance, called a *covenant to stand seised to uses*: by which a man, seised of lands, covenants in consideration of blood or marriage that he will stand seised of the same to the use of his child, wife, or kinsman: for life, in tail, or in fee. Here the statute executes at once the estate; for the party intending to be benefited, having thus acquired the use, is thereby put at once into corporal possession of the land [k], without ever seeing it, by a kind of parliamentary magic. But this conveyance can only operate, when made upon such weighty and interesting considerations as those of blood or marriage. (25)

[k] Bacon, Use of the law, 151.

"purposes, without producing one inconvenience, fraud, or private mis-"chief, which the statute of Hen. 8. meant to avoid."

An expression is sometimes to be found in the books, that trusts are now what uses formerly were. A use, indeed, before the statute of uses, was, as a trust since is, a fiduciary or beneficial interest, distinct from the legal estate; and so far the expression is correct: but, abstractedly, no objection can arise to the essence or quality, either of the use or trust. It was the system adopted with respect to uses by courts of justice, which gave rise to the necessity of passing the statute of uses; and the difference between uses before, and trusts since the statute, consists in the opposite construction adopted by the court of chancery respecting them; or, as it has been said, "there is no difference in the principles, but there is a wide difference in the exercise of them." On Uses and Trusts, 1. 265.

(25) An inconvenience attends the estate raised by this form of conveyance in consequence of which it is now seldom resorted to. As the conveyance operates not by any actual transmutation of possession, but only by way of executory covenant, and as it can only operate in favour of persons coming within the consideration of blood or marriage, it follows that no uses can arise upon it in favour of strangers, nor even in favour of kinsmen, where the words of creation are so general that they will include

13. A thirteenth species of conveyance, introduced by this statute, is that of *bargain and sale* of lands; which is a kind of real contract, whereby the bargainor for some pecuniary consideration bargains and sells, that is, contracts to convey the land to the bargainee; and becomes by such a bargain a trustee for, or seised to the use of, the bargainee: and then the statute of uses completes the purchase [l]; or, as it hath been well expressed [m], the bargain first vests the use, and then the statute vests the possession. But as it was foreseen that conveyances, thus made, would want all those benefits of notoriety, which the old common law assurances were calculated to give; to prevent therefore clandestine conveyances of freeholds, it was enacted in the same session of parliament by statute 27 Hen. VIII. c. 16, that such bargains and sales should not enure to pass a freehold, unless the same be made by indenture and *enrolled* within six months in one of the courts of Westminster-hall, or with the *custos rotulorum* of the county. Clandestine bargains and sales of chattel interests, or leases for years, were thought not worth regarding, as such interests were very precarious, till about six years before [n]; which also occasioned them to be
[339] overlooked in framing the statute of uses: and therefore such bargains and sales are not directed to be enrolled. But how impossible it is to foresee, and provide against, all the consequences of innovations; This omission has given rise to

14. A fourteenth species of conveyance, *viz.* by *lease and release*; first invented by serjeant Moore, soon after the

[l] Bacon, Use of the law, 150.
[m] Cro. Jac. 697.
[n] See pag. 142.

one as well as the other. Thus, 1st, If a man covenants to stand seised to his own use for life, remainder to the use of trustees (not being kinsmen), for the purpose of preserving contingent remainders, remainder to his first and other sons in tail; no use vests in the trustees, because the consideration does not reach to them; and 2d, If a man covenants to stand seised to his own use for life, with remainders over to his relations, and provides himself with a power generally to make leases, here the power is void; in the frame and contemplation of it it applies to leases to strangers, as well as kinsmen, and therefore cannot be executed even in favour of the latter. *Mildmay's* Case, 1 Rep. 176. Sanders on Uses and Trusts, 2. p. 83.

statute of uses, and now the most common of any, and therefore not to be shaken; though very great lawyers (as particularly, Mr. Noy, attorney-general to Charles I.) have formerly doubted it's validity.[o] It is thus contrived. A lease, or rather bargain and sale, upon some pecuniary consideration, for one year, is made by the tenant of the freehold to the lessee or bargainee. Now this, without any enrolment, makes the bargainor stand seised to the use of the bargainee, and vests in the bargainee the *use* of the term for a year; and then the statute immediately annexes the *possession*. He therefore, being thus in possession, is capable of receiving a release of the freehold and reversion; which, we have seen before[p], must be made to a tenant in possession: and, accordingly, the next day, a release is granted to him[q]. This is held to supply the place of livery of seisin: and so a conveyance by lease and release is said to amount to a feoffment[r].(26)

15. To these may be added deeds to *lead* or *declare the uses* of other more direct conveyances, as feoffments, fines, and recoveries; of which we shall speak in the next chapter: and

16. DEEDS of *revocation of uses*, hinted at in a former page[s], and founded in a previous power, reserved at the

[o] 2 Mod. 252.
[p] pag. 324.
[q] See Appendix, N° II. § 1, 2.
[r] Co. Litt. 207. Cro. Jac. 604.
[s] pag. 335.

(26) Prior to the statute of uses, this form of conveyance was in existence; the person wishing to transfer a freehold to another, granted him an actual lease for two or three years, the lessee actually entered, and then was capable of accepting a release of the freehold. As, however, an actual entry was necessary, this mode of conveyance was nearly as inconvenient as a feoffment, and when completed was not in all respects so powerful; it was therefore seldom resorted to. The statute of uses has dispensed with actual entry, but though the relessee is thus made capable of taking the release by the statute, yet the estate which he takes is one at common law, exactly as if he had actually entered under his lease. And if the release be not to his own use, but to the use of another, that is not a use upon a use which the statute will not execute; but the *cestuy* use will take the legal estate. See 2 Sanders, 61. 63. Upon the general subject of conveyances at common law, and under the statute, I would refer the student to a useful and ingenious note by Mr. Buller on Co. Litt. 271. b.

raising of the uses [t], to revoke such as were then declared; and to appoint others in their stead, which is incident to the power of revocation [u]. And this may suffice for a specimen of conveyances founded upon the statute of uses: and will finish our observations upon such deeds as serve to *transfer* real property.

] BEFORE we conclude, it will not be improper to subjoin a few remarks upon such deeds as are used not to *convey*, but to *charge* or incumber lands, and to *discharge* them again: of which nature are, *obligations* or bonds, *recognizances*, and *defeazances* upon them both.

1. AN *obligation*, or bond, is a deed [v] whereby the obligor obliges himself, his heirs, executors, and administrators, to pay a certain sum of money to another at a day appointed. If this be all, the bond is called a single one, *simplex obligatio*: but there is generally a condition added, that if the obligor does some particular act, the obligation shall be void, or else shall remain in full force: as payment of rent; performance of covenants in a deed; or repayment of a principal sum of money borrowed of the obligee, with interest, which principal sum is usually one-half of the penal sum specified in the bond. In case this condition is not performed, the bond becomes forfeited, or absolute at law, and charges the obligor, while living; and after his death the obligation descends upon his heir, who (on defect of personal assets) is bound to discharge it, provided he has real assets by descent as a recompense. So that it may be called, though not a *direct*, yet a *collateral*, charge upon the lands. (27) How it affects the personal property of the obligor will be more properly considered hereafter.

[t] See Appendix, N° II. pag. xi.
[u] Co. Litt. 237.
[v] See Appendix, N° III. pag. xiii.

(27) The obligor does not necessarily bind his heir by his bond; and unless he does so expressly, the law will not imply the obligation, Co. Litt. 209. a. And where the heir is thus expressly bound, his liability extends only to the amount of the assets descended.

If the condition of a bond be impossible at the time of making it, or be to do a thing contrary to some rule of law that is merely positive, or be uncertain, or insensible, the condition alone is void, and the bond shall stand single, and unconditional; for it is the folly of the obligor to enter into such an obligation, from which he can never be released. If it be to do a thing that is *malum in se*, the obligation itself is void: for the whole is an unlawful contract, and the obligee shall take no advantage from such a transaction. And if the condition be possible at the time of making it, and afterwards becomes impossible by the act of God, the act of law, [341] or the act of the obligee himself, there the penalty of the obligation is saved; for no prudence or foresight of the obligor could guard against such a contingency [w]. On the forfeiture of a bond, or it's becoming single, the whole penalty was formerly recoverable at law: but here the courts of equity interposed, and would not permit a man to take more than in conscience he ought; *viz.* his principal, interest, and expenses, in case the forfeiture accrued by non-payment of money borrowed; the damages sustained, upon non-performance of covenants; and the like. And the like practice having gained some footing in the courts of law [x], the statute 4 & 5 Ann. c. 16. at length enacted, in the same spirit of equity, that, in case of a bond conditioned for the payment of money, the payment or tender of the principal sum due, with interest and costs, even though the bond be forfeited and a suit commenced thereon, shall be a full satisfaction and discharge.(28)

2. A *recognizance* is an obligation of record, which a man enters into before some court of record or magistrate duly authorised [y], with condition to do some particular act; as to appear at the assises, to keep the peace, to pay a debt, or the like. It is in most respects like another bond: the difference being chiefly this: that the bond is the creation of a fresh debt or obligation *de novo*, the recognizance is an acknow-

[w] Co. Litt. 206.
[x] 2 Keb. 553. 555. Salk. 596, 597. 6 Mod. 11. 60. 101.
[y] Bro. *Abr. tit. recognizance*, 8—14.

(28) See post, p. 465.

ledgment of a former debt upon record; the form whereof is, "that A. B. doth acknowledge to owe to our lord the king, "to the plaintiff, to C. D. or the like, the sum of ten pounds," with condition to be void on performance of the thing stipulated: in which case the king, the plaintiff, C. D., &c. is called the recognizee, "*is cui cognoscitur*;" as he that enters into the recognizance is called the cognizor, "*is qui cognoscit.*" This being either certified to or taken by the officer of some court, is witnessed only by the record of that court, and not by the party's seal: so that it is not in strict propriety a deed, though the effects of it are greater than a
[342] common obligation: being allowed a priority in point of payment, and binding the lands of the cognizor [even in the hands of a purchasor *bonâ fide* and for valuable consideration] from the time of enrolment on record [z]. There are also other recognizances, of a private kind, *in nature of a statute staple*, by virtue of the statute 23 Hen. VIII. c. 6. which have been already explained [a], and shewn to be a charge upon real property.

3. A DEFEAZANCE, on a bond, or recognizance, or judgment recovered, is a condition which, when performed, defeats or undoes it, in the same manner as a defeazance of an estate before mentioned. It differs only from the common condition of a bond, in that the one is always inserted in the deed or bond itself, the other is made between the same parties by a separate, and frequently a subsequent deed [b]. This, like the condition of a bond, when performed, discharges and disincumbers the estate of the obligor.

THESE are the principal species of deeds or matter *in pais*, by which estates may be either conveyed, or at least affected. Among which the conveyances to uses are by much the most frequent of any: though in these there is certainly one palpable defect, the want of sufficient notoriety; so that purchasors or creditors cannot know, with any absolute certainty, what the estate, and the title to it, in reality are, upon which they are to lay out or to lend their money. In the antient

[a] Stat. 29 Car. II. c. 3. See pag. 161. [b] Co. Litt. 237. 2 Saund. 47.
[z] See pag. 160.

feodal method of conveyance, (by giving corporal seisin of the lands,) this notoriety was in some measure answered; but all the advantages resulting from thence are now totally defeated by the introduction of death-bed devises and secret conveyances: and there has never been yet any sufficient guard provided against fraudulent charges and incumbrances; since the disuse of the old Saxon custom of transacting all conveyances at the county-court, and entering a memorial of them in the chartulary or leger-book of some adjacent monastery [c]; and the failure of the general register established by king Richard the first, for the starrs or mortgages made to Jews, in the *capitula de Judaeis*, of which Hoveden has preserved a copy. How far the establishment of a like general register, for deeds, and wills, and other acts affecting real property, would remedy this inconvenience, deserves to be well considered. In Scotland every act and event, regarding the transmission of property, is regularly entered on record [d]. And some of our own provincial divisions, particularly the extended county of York, and the populous county of Middlesex, have prevailed with the legislature [e] to erect such registers in their several districts. But, however plausible these provisions may appear in theory, it hath been doubted by very competent judges, whether more disputes have not arisen in those counties by the inattention and omission of parties, than prevented by the use of registers. [343]

[c] Hickes *Dissertat. epistolar.* 9.
[d] Dalrymple on feodal property, 262.
[e] Stat. 2 & 3 Ann. c. 4. 6 Ann. c. 35, 7 Ann. c. 20, 8 Geo. II. c. 6, &c.

CHAPTER THE TWENTY-FIRST.

OF ALIENATION BY MATTER OF RECORD.

ASSURANCES by *matter of record* are such as do not entirely depend on the act or consent of the parties themselves: but the sanction of a court of record is called in to substantiate, preserve, and be a perpetual testimony of the transfer of property from one man to another; or of it's establishment, when already transferred. Of this nature are, 1. Private acts of parliament. 2. The king's grants. 3. Fines. 4. Common recoveries.

I. PRIVATE *acts of parliament* are, especially of late years, become a very common mode of assurance. For it may sometimes happen, that by the ingenuity of some, and the blunders of other practitioners, an estate is most grievously entangled by a multitude of contingent remainders, resulting trusts, springing uses, executory devises, and the like artificial contrivances; (a confusion unknown to the simple conveyances of the common law;) so that it is out of the power of either the courts of law or equity to relieve the owner. Or it may sometimes happen, that by the strictness or omissions of family-settlements, the tenant of the estate is abridged of some reasonable power, (as letting leases, making a jointure for a wife, or the like,) which power cannot be given him by the ordinary judges either in common law or equity. Or it may be necessary, in settling an estate, to secure it against the claims of infants or others persons under legal disabilities; who are not bound by any judgments or decrees of the ordinary courts of justice. In these, or other cases of the like kind,

the transcendent power of parliament is called in, to cut the Gordian knot; and by a particular law, enacted for this very purpose, to unfetter an estate; to give it's tenant reasonable powers; or to assure it to a purchasor, against the remote or latent claims of infants or disabled persons, by settling a proper equivalent in proportion to the interest so barred. This practice was carried to a great length in the year succeeding the restoration; by setting aside many conveyances alleged to have been made by constraint, or in order to screen the estates from being forfeited during the usurpation. And at last it proceeded so far, that, as the noble historian expresses it [a], every man had raised an equity in his own imagination, that he thought was entitled to prevail against any descent, testament, or act of law, and to find relief in parliament: which occasioned the king at the close of the session to remark [b], that the good old rules of law are the best security; and to wish, that men might not have too much cause to fear, that the settlements which they make of their estates, shall be too easily unsettled when they are dead, by the power of parliament.

Acts of this kind are however at present carried on, in both houses, with great deliberation and caution; particularly in the house of lords they are usually referred to two judges to examine and report on the facts alleged, and to settle all technical forms. Nothing also is done without the consent, expressly given, of all parties in being, and capable of consent, that have the remotest interest in the matter: unless such consent shall appear to be perversely and without any reason withheld. And, as was before hinted, an equivalent in money or other estate is usually settled upon infants, or persons not *in esse*, or not of capacity to act for themselves, who are to be concluded by this act. And a general saving is constantly added, at the close of the bill, of the right and interest of all persons whatsoever; except those whose consent is so given or purchased, and who are therein particularly named: though it hath been holden, that, even if such saving be omitted, the act shall bind none but the parties [c].

[a] Lord. Clar. Contin. 162.
[b] *Ibid.* 163.
[c] 8 Co. 138. Godb. 171.

A law, thus made, though it binds all the parties to the bill, is yet looked upon rather as a private conveyance, than as the solemn act of the legislature. It is not therefore allowed to be a *public*, but a mere *private* statute; it is not printed or published among the other laws of the session; it hath been relieved against, when obtained upon fraudulent suggestions [c]; it hath been holden to be void, if contrary to law and reason [d]; and no judge or jury is bound to take notice of it, unless the same be specially set forth and pleaded to them. It remains however enrolled among the public records of the nation, to be for ever preserved as a perpetual testimony of the conveyance or assurance so made or established.

II. The *king's grants* are also matter of public record. For as St. Germyn says [e], the king's excellency is so high in the law, that no freehold may be given to the king, nor derived from him, but by matter of record. And to this end a variety of offices are erected, communicating in a regular subordination one with another, through which all the king's grants must pass, and be transcribed, and enrolled; that the same may be narrowly inspected by his officers, who will inform him if any thing contained therein is improper, or unlawful to be granted. These grants, whether of lands, honours, liberties, franchises, or ought besides, are contained in charters, or letters *patent*, that is, open letters, *literae patentes*: so called because they are not sealed up, but exposed to open view, with the great seal pendant at the bottom; and are usually directed or addressed by the king to all his subjects at large. And therein they differ from certain other letters of the king, sealed also with his great seal, but directed to particular persons, and for particular purposes: which therefore, not being proper for public inspection, are closed up and sealed on the outside, and are thereupon called writs *close*, *literae clausae*, and are recorded in the *close-rolls*, in the same manner as the others are in the *patent-rolls*.

Grants or letters patent must first pass by *bill*: which is prepared by the attorney and solicitor general, in consequence

[c] Richardson *v.* Hamilton. *Canc.* 8. Jan. 1773. M'Kenzie *v.* Stuart. *Dom. Proc.* 13 Mar. 1754.

[d] 4 Rep. 12.

[e] Dr. & Stud. b. 1. d. 8.

of a warrant from the crown; and is then signed, that is, subscribed at the top, with the king's own *sign manual*, and sealed with his *privy signet*, which is always in the custody of the principal secretary of state; and then sometimes it immediately passes under the great seal, in which case the patent is subscribed in these words, "*per ipsum regem*, by the king "himself[d]." Otherwise the course is to carry an extract of the bill to the keeper of the *privy seal*, who makes out a writ or warrant thereupon to the chancery; so that the sign manual is the warrant to the privy seal, and the privy seal is the warrant to the great seal: and in this last case the patent is subscribed, "*per breve de privato sigillo*, by writ of privy "seal[e]." But there are some grants which only pass through certain offices, as the admiralty or treasury, in consequence of a *sign manual*, without the confirmation of either the *signet*, the *great* or the *privy* seal.

THE *manner* of granting by the king does not more differ from that by a subject, than the *construction* of his grants, when made. 1. A grant made by the king, *at the suit of the grantee*, shall be taken most beneficially *for* the king, and *against* the party: whereas the grant of a subject is construed most strongly *against the grantor*. Wherefore it is usual to insert in the king's grants, that they are made, not at the suit of the grantee, but "*ex speciali gratia, certa scientia, et mero* "*motu regis*;" and then they have a more liberal construction[f]. 2. A subject's grant shall be construed to include many things, besides what are expressed, if necessary for the operation of the grant. Therefore, in a private grant of the profits of land for one year, free ingress, egress, and regress, to cut and carry away those profits, are also inclusively granted[g]: and if a feoffment of land was made by a lord to his villein, this operated as a manumission[h]; for he was otherwise unable to hold it. But the king's grant shall not enure to any other intent, than that which is precisely expressed in the grant. As, if he grants land to an alien, it operates nothing; for such grant shall not also enure to [348]

[d] 2 Rep. 17. b. 9 Rep. 92.
[e] *Ibid.* 2 Inst. 555.
[f] Finch. L. 100. 10 Rep. 112.
[g] Co. Litt. 56.
[h] Litt. § 206.

make him a denizen, that so he may be capable of taking by grant[i]. 3. When it appears, from the face of the grant that the king is mistaken, or deceived, either in matter of fact or matter of law, as in case of false suggestion, misinformation, or misrecital of former grants; or if his own title to the thing granted be different from what he supposes; or if the grant be informal; or if he grants an estate contrary to the rules of law: in any of these cases the grant is absolutely void[k]. For instance, if the king grants lands to one and his *heirs male*, this is merely void: for it shall not be an estate-tail, because there want words of procreation, to ascertain the body out of which the heirs shall issue: neither is it a fee-simple, as in common grant it would be; because it may reasonably be supposed, that the king meant to give no more than an estate-tail[l]: the grantee is therefore (if any thing) nothing more than tenant at will[m]. And to prevent deceits of the king, with regard to the value of the estate granted, it is particularly provided by the statute 1 Hen. IV. c. 6. that no grant of his shall be good, unless, in the grantee's petition for them, express mention be made of the real value of the lands.

III. WE are next to consider a very usual species of assurance, which is also of record; *viz.* a *fine* of lands and tenements. In which it will be necessary to explain, 1. The *nature* of a fine; 2. It's several *kinds*; and 3. It's *force* and *effect*.

1. A FINE is sometimes said to be a feoffment of record[n]: though it might with more accuracy be called an acknowledgment of a feoffment on record. By which is to be understood, that it has at least the same force and effect with a feoffment, in the conveying and assuring of lands: though it is one of those methods of transferring estates of freehold by the common law, in which livery of seisin is not necessary to
[349] be actually given; the supposition and acknowledgment thereof in a court of record, however fictitious, inducing an equal notoriety. But, more particularly, a fine may be

[i] Bro. *Abr. tit Patent*, 62. Finch. L. 101.
[k] Freem. 172.
[l] Finch. 101, 102.
[m] Bro. *Abr. tit Estates*, 33. *tit. Patents*, 104. Dyer, 270. Dav. 45.
[n] Co. Litt. 50.

described to be an amicable composition or agreement of a suit, either actual or fictitious, by leave of the king or his justices: whereby the lands in question become, or are acknowledged to be, the right of one of the parties [o]. In it's original it was founded on an actual suit, commenced at law for recovery of possession of land or other hereditaments; and the possession thus gained by such composition was found to be so sure and effectual, that fictitious actions were, and continue to be, every day commenced, for the sake of obtaining the same security.

A FINE is so called because it puts *an end*, not only to the suit thus commenced, but also to all other suits and controversies concerning the same matter. Or, as it is expressed in an ancient record of parliament [p], 18 Edw. I. "*Nec in regno* "*Angliae provideatur, vel sit, aliqua securitas major vel solemp-* "*nior, per quam aliquis vel aliqua statum certiorem habere* "*possit, vel ad statum suum verificandum aliquod solennius* "*testimonium producere, quam finem in curia domini regis* "*levatum: qui quidem finis sic vocatur, eo quod finis et consum-* "*matio omnium placitorum esse debet, et hac de causâ provide-* "*batur.*" Fines indeed are of equal antiquity with the first rudiments of the law itself; are spoken of by Glanvil [q] and Bracton [r] in the reigns of Hen. II. and Hen. III. as things then well known and long established; and instances have been produced of them even prior to the Norman evasion [s]. So that the statute 18 Edw. I. called *modus levandi fines*, did not give them original, but only declared and regulated the manner in which they should be levied or carried on. And that is as follows:

1. THE party to whom the land is to be conveyed or assured, commences an action or suit at law against the other, generally an action of covenant [t], by suing out a writ of *praecipe*, called a writ of covenant [v]: the foundation of which is a supposed agreement or covenant, that the one shall con- [350]

[o] Co. Litt. 120.
[p] 2 Roll. Abr. 13.
[q] *l.* 8. *c.* 1.
[r] *l.* 5. *tr.* 5. *c.* 28. § 7.
[s] Plowd. 369.
[t] A fine may also be levied on a writ of *incone*, of *warrantia chartae*, or *de consuetudinibus et servitus*. (Finch. L. 278.)
[v] See Appendix, No. IV. § 1.

vey the lands to the other: on the breach of which agreement the action is brought. On this writ there is due to the the king, by antient prerogative, a *primer fine*, or a noble for every five marks of land sued for; that is, one tenth of the annual value [u]. The suit being thus commenced, then follows,

2. The *licentia concordandi*, or leave to agree the suit For, as soon as the action is brought, the defendant, knowing himself to be in the wrong, is supposed to make overtures of peace and accommodation to the plaintiff. Who, accepting them, but having, upon suing out the writ, given pledges to prosecute his suit, which he endangers if he now deserts it without licence, therefore applies to the court for leave to make the matter up. This leave is readily granted, but for it there is also another fine due to the king by his prerogative, which is an ancient revenue of the crown, and is called the *king's silver*, or sometimes the *post fine*, with respect to the *primer fine* before mentioned. And it is as much as the *primer fine*, and half as much more, or ten shillings for every five marks of land; that is, three-twentieths of the supposed annual value [x].

3. Next comes the *concord*, or agreement itself [y], after leave obtained from the court: which is usually an acknowledgment from the deforciants (or those who keep the other out of possession) that the lands in question are the right of the complainant. And from this acknowledgment, or recognition of right, the party levying the fine is called the
[351] *cognizor*, and he to whom it is levied the *cognizee*. This acknowledgment must be made either openly in the court of common pleas, or before the lord chief justice of that court; or else before one of the judges of that court, or two or more commissioners in the country, empowered by a special authority called a writ of *dedimus potestatem*; which judges and commissioners are bound by statute 18 Edw. I. st. 4. to take

[u] 2 Inst. 511.

[w] Appendix, No. IV. § 2. In the times of strict feodal jurisdiction, if a vassal had commenced a suit in the lord's court, he could not abandon it without leave; lest the lord should be deprived of his perquisites for deciding the cause. (Robertson, Cha. V. i. 31.)

[x] 5 Rep. 39. 2 Inst. 511. Stat. 32 Geo. II. c. 14.

[y] Appendix, No. IV. § 3.

care that the cognizors be of full age, sound memory, and out of prison. If there be any feme-covert among the cognizors, she is privately examined where she does it willingly and freely or by compulsion of her husband.

By these acts all the essential parts of a fine are completed: and, if the cognizor dies the next moment after the fine is acknowledged, provided it be subsequent to the day on which the writ is made returnable[z], (1) still the fine shall be carried on in all it's remaining parts: of which the next is,

4. The *note* of the fine[a]; which is only an abstract of the writ of covenant, and the concord; naming the parties, the parcels of land, and the agreement. This must be enrolled of record in the proper office, by direction of the statute 5 Hen. IV. c. 14.

5. The fifth part is the *foot* of the fine, or conclusion of it: which includes the whole matter, reciting the parties, day, year, and place, and before whom it was acknowledged or levied[b]. Of this there are indentures made, or engrossed, at the chirographer's office, and delivered to the cognizor and the cognizee; usually beginning thus, "*haec est finalis* "*concordia*, this is the final agreement," and then reciting the whole proceeding at length. And thus the fine is completely levied at common law.

By several statutes still more solemnities are superadded, in order to render the fine more universally public, and less liable to be levied by fraud or covin. And, first by 27 Edw. I. c. 1., the note of the fine shall be openly read in the court of [352] common pleas, at two several days in one week, and during such reading all pleas shall cease. By 5 Hen. IV. c. 14. and 23 Eliz. c. 3., all the proceedings on fines, either at the time of acknowledgment, or previous or subsequent thereto, shall

[z] Comb. 71. [a] Appendix, No. IV. § 4. [b] *Ibid.* § 5.

(1) The death of the cognizor before the return day of the writ, would have the effect of abating the suit before the court had acquired any jurisdiction in the matter, and of course before it could grant leave to make up the suit.

be enrolled of record in the court of common pleas. By 1 Ric. III. c. 7. confirmed and enforced by 4 Hen. VII. c. 24., the fine, after engrossment, shall be openly read and proclaimed in court (during which all pleas shall cease) sixteen times; *viz.* four times in the term in which it is made, and four times in each of the three succeeding terms; which is reduced to once in each term by 31 Eliz. c. 2., and these proclamations are indorsed on the back of the record [c]. It is also enacted by 23 Eliz. c. 3., that the chirographer of fines shall every term write out a table of the fines levied in each county in that term, and shall affix them in some open part of the court of common pleas all the next term: and shall also deliver the contents of such table to the sheriff of every county, who shall at the next assises fix the same in some open place in the court, for the more public notoriety of the fine.

2. Fines, thus levied, are of four kinds. 1. What in our law French is called a fine "*sur cognizance de droit, come ceo que il ad de son done;*" or, a fine upon acknowledgment of the right of the cognizee, as that which he hath of the gift of the cognizor [d]. This is the best and surest kind of fine; for thereby the deforciant, in order to keep his covenant with the plaintiff, of conveying to him the lands in question, and at the same time to avoid the formality of an actual feoffment and livery, acknowledges in court a former feoffment, or gift in possession, to have been made by him to the plaintiff. This fine is therefore said to be a feoffment of record; the livery thus acknowledged in court, being equivalent to an actual livery; so that this assurance is rather a confession of a former conveyance, than a conveyance now originally made; for the deforciant or cognizor acknowledges, *cognoscit*, [353] the right to be in the plaintiff, or cognizee, as that which he hath *de son done*, of the proper gift of himself, the cognizor. 2. A fine "*sur cognizance de droit tantum,*" or upon acknowledgment of the right merely; not with the circumstance of a preceding gift from the cognizor. This is commonly used to pass a *reversionary* interest, which is in the cognizor. For

[c] Appendix, No. IV. § 6.

[d] This is that sort, of which an example is given in the Appendix, No. IV.

of such reversions there can be no feoffment, or donation with livery, supposed; as the possession during the particular estate belongs to a third person [e]. It is worded in this manner: "that the cognizor acknowledges the right to be in "the cognizee; and grants for himself and his heirs, that the "reversion, after the particular estate determines, shall go to the cognizee [f]." 3. A fine "*sur concessit*" is where the cognizor, in order to make an end of disputes, though he acknowledges no precedent right, yet grants to the cognizee an estate *de novo* usually for life or years, by way of supposed composition. And this may be done reserving a rent, or the like; for it operates as a new grant [g]. 4. A fine, *sur done, grant, et render*," is a double fine, comprehending the fine *sur cognizance de droit come ceo, &c.* and the fine *sur concessit:* and may be used to create particular limitations of estate: whereas the fine *sur cognizance de droit come ceo, &c.* conveys nothing but an absolute estate, either of inheritance or at least of freehold [h]. In this last species of fine, the cognizee, after the right is acknowledged to be in him, grants back again, or renders to the cognisor, or perhaps to a stranger, some other estate in the premises. But, in general, the first species of fine, *sur cognizance de droit come ceo, &c.* is the most used, as it conveys a clean and absolute freehold, and gives the cognizee a seisin in law, without any actual livery; and is therefore called a fine executed, whereas the others are but executory.

3. We are next to consider the *force* and *effect* of a fine. These principally depend, at this day, on the common law, and the two statutes, 4 Hen. VII. c. 24. and 32 Hen. VIII. c. 36. The antient common law, with respect to this point, is very forcibly declared by the statute 18 Edw. I. in these [354] words; "And the reason, why such solemnity is required "in the passing of a fine, is this; because the fine is so high "a bar, and of so great force, and of a nature so powerful "in itself, that it precludes not only those which are parties "and privies to the fine, and their heirs, but all other persons in the world, who are of full age, out of prison, of "sound memory, and within the four seas, the day of the

[e] Moor. 629.
[f] West. Symb. p. 2. § 95.
[g] West. p. 2. § 66.
[h] Salk. 340.

"fine levied; unless they put in their claim on the foot [h] of "the fine within a year and a day." But this doctrine, of barring the right by *non-claim*, was abolished for a time by a statute made in 34 Edw. III. c. 16. which admitted persons to claim, and falsify a fine, at any indefinite distance [i]; whereby, as sir Edward Coke observes [k], great contention arose, and few men were sure of their possessions, till the parliament held 4 Hen. VII. reformed that mischief, and excellently moderated between the latitude given by the statute and the rigour of the common law. For the statute, then made [l] restored the doctrine of non-claim; but extended the time of claim. So, that now, by that statute, the right of all strangers whatsoever is bound, unless they make claim, by way of action or lawful entry, not within *one* year and a day, as by the common law, but within *five* years after proclamation made: except feme-coverts, infants, prisoners, persons beyond the seas, and such as are not of whole mind; who have five years allowed to them and their heirs, after the death of their husbands, their attaining full age, recovering their liberty, returning into England, or being restored to their right mind.

It seems to have been the intention of that politic prince, king Henry VII., to have covertly by this statute extended fines to have been a bar of estates-tail, in order to unfetter the more easily the estates of his powerful nobility, and lay them more open to alienations; being well aware that power will always accompany property. But doubts having arisen whether they could, by mere implication, be adjudged a sufficient bar (which they were expressly declared *not* to be by the statute *de donis*), the statute 32 Hen. VIII. c. 36. was thereupon made; which removes all difficulties, by declaring that a fine levied by any person of full age, to whom or to whose ancestors lands have been entailed, shall be a perpetual bar to them and their heirs claiming by force of such entail:

[h] *Sur la pie* as it is in the Cotton MS. and not *pur le pass*, as printed by Berthelet, and in 2 Inst. 511: There were then four methods of claiming, so as to avoid being concluded by a fine: 1. By action. 2. By entering such claim on the record at the *foot* of the fine. 3. By entry on the lands. 4. By continual claim, 2 Inst. 518. The second is not now in force under the statute of Henry VII.

[i] Litt. § 441.

[k] 2 Inst. 518.

[l] 4 Hen. VII. c. 24. See page 118.

unless the fine be levied by a woman after the death of her husband, of lands which were, by the gift of him or his ancestors, assigned to her in tail for her jointure [m]; or unless it be of lands entailed by act of parliament or letters patent, and whereof the reversion belongs to the crown.

From this view of the common law, regulated by these statutes, it appears, that a fine is a solemn conveyance on record from the cognizor to the cognizee, and that the persons bound by a fine are *parties*, *privies*, and *strangers*.

The *parties* are either the cognizors, or cognizees, and these are immediately concluded by the fine, and barred of any latent right they might have, even though under the legal impediment of coverture. And indeed, as this is almost the only act that a *feme-covert*, or married woman, is permitted by law to do (and that because she is privately examined as to her voluntary consent, which removes the general suspicion of compulsion by her husband), it is therefore the usual and almost the only safe method, whereby she can join in the sale, settlement, or incumbrance of any estate.

Privies to a fine are such as are any way related to the parties who levy the fine, and claim under them by any right of blood or other right of representation. Such as are the heirs general of the cognizor, the issue in tail since the statute of Henry the eighth, the vendee, the devisee, and all others who must make title by the persons who levied the fine. For the act of the ancestor shall bind the heir, and the act of the principal his substitute, or such as claim under any conveyance made by him subsequent to the fine so levied [n]. [356]

Strangers to a fine are all other persons in the world, except only parties or privies. And these are also bound by a fine, unless, within five years after proclamations made, they interpose their claim: provided they are under no legal impediments, and have then a present interest in the estate. The impediments, as hath before been said, are coverture, infancy, imprisonment, insanity, and absence beyond sea; and

[m] See statute 11 Hen. VII. c. 20.

[n] 3 Rep. 87.

persons, who are thus incapacitated to prosecute their rights, have five years allowed them to put in their claims after such impediments are removed. Persons also that have not a present, but a future interest only, as those in remainder or reversion, have five years allowed them to claim in, from the time that such right accrues [o]. (2) And if within that time they neglect to claim, or (by the statute 4 Ann. c. 16.) if they do not bring an action to try the right within one year after making such claim, and prosecute the same with effect, all persons whatsoever are barred of whatever right they may have, by force of the statute of non-claim.

But, in order to make a fine of any avail at all it is necessary that the parties should have some interest or estate in the lands to be affected by it. Else it were possible that two strangers, by a mere confederacy, might without any risque defraud the owners by levying fines of their lands; for if the attempt be discovered, they can be no sufferers, but must only remain *in statu quo*; whereas if a tenant for life levies a fine, it is an absolute forfeiture of his estate to the remainder-man or reversioner [p] if claimed in proper time. It is not therefore to be supposed that such tenants will frequently run so great a hazard; but if they do, and the claim is not duly made within five years after their respective terms expire [q], the estate is for ever barred by it. Yet where a stranger, whose presumption cannot be thus punished, officiously interferes in an estate which in no wise belongs to him,
[357] his fine is of no effect; and may at any time be set aside (unless by such as are parties or privies thereunto [r]) by pleading that "*partes finis nihil habuerunt.*" And, even if a tenant for years, who hath only a chattel interest, and no freehold in the land, levies a fine, it operates nothing, but is liable to be defeated by the same plea [s]. Wherefore when a

[o] Co. Litt. 372.
[p] *Ibid.* 251.
[q] 2 Lev. 52.
[r] Hob. 334.
[s] 5 Rep. 123. Hardr. 401.

(2) And if a person has both a present and a future interest (as the remainder man after a tenant for life has levied a fine), he may wave his immediate title of entry, that which the forfeiture gives him, and enter within five years after the death of the tenant of life. *Laund* v. *Tucker*, Cro. Eliz. 254.

lessee for years is disposed to levy a fine, it is usual for him to make a feoffment first, to displace the estate of the reversioner[t], and create a new freehold by disseisin. And thus much for the conveyance or assurance by fine; which not only, like other conveyances, binds the grantor himself, and his heirs; but also all mankind, whether concerned in the transfer or no, if they fail to put in their claims within the time allotted by law. (3)

[t] Hardr. 402. 2 Lev. 52.

(3) It will be obvious to the student, that the effect of a fine upon the rights of strangers, is one great cause of its frequent use; because dormant titles, which would subsist with a right of entry for twenty years, and a right of action for many more, are thereby extinguished in ordinary cases in five years. This results from the nature of a fine, which being the agreement of a suit respecting lands or tenements made solemnly by permission of the court, was held to be as *immediately* and extensively binding, as a judgment in a writ of right would have been, and therefore binding all the world, after a year and a day, at common law.

Another effect of fines, I mean their operation on the issue of tenant in tail, is attributable merely to statutory provisions. Mr. Hargrave in his note on Co. Lit. 121ᵇ a. n. 171. discusses at some length the question whether the statute which gave them this effect was the 4 H. 7. c. 24. or the 32 H. 8. It is of little importance, except as marking historically the policy pursued by different princes, in facilitating the alienation of lands. In this point of view, Mr. Hargrave's remark is worthy of attention, that entails received their death-wound from the establishment of common recoveries by the *opinion* pronounced in Taltarum's case so early as the 12th of Edward 4. By a common recovery, any tenant in tail in possession before the statute of H. 7. might have barred the entail in the most perfect and absolute manner; whereas after that statute, and to this day, a fine does it only partially; and with respect to the issue in tail, certainly any common reader of the statute would not detect the supposed policy of Hen. VII.; indeed Mr. D. Barrington asserts, that instead of destroying, it saved estates in tail. Observ. 448. 4th edit. It will naturally be asked by the student, if the operation of a fine, whether by the one or the other statute, in barring entails is so limited, and that of a common recovery so complete, why it is ever resorted to for that purpose? The answer is, that under some circumstances its limited operation is all that is necessary; as where a tenant in tail in possession has the immediate reversion or remainder in fee; in which case no one can make title to the estate, except as his priory or heir, who would be barred immediately by a fine. Under other circumstances the party cannot suffer a common recovery, as where the tenant in tail is only a remainder man, and he who has the freehold in possession will not join him in the necessary conveyances; in such a case all that can be done is to bar those claiming under the remainder man by his fine.

Another

IV. The fourth species of assurance, by matter of record, is a *common recovery*. Concerning the original of which it was formerly observed [u], that common recoveries were invented by the ecclesiastics to elude the statutes of mortmain: and afterwards encouraged by the finesse of the courts of law in 12 Edw. IV. in order to put an end to all fettered inheritances, and bar not only estates-tail, but also all remainders and reversions expectant thereon. I am now therefore only to consider, first, the *nature* of a common recovery; and, secondly, its *force* and *effect*.

1. And, first, the *nature* of it; or what a common recovery is. A common recovery is so far like a fine, that it is a suit or action, either actual or fictitious: and in it the lands are *recovered* against the tenant of the freehold; which recovery, being a supposed adjudication of the right, binds all persons, and vests a free and absolute fee-simple in the recoveror. A recovery therefore being in the nature of an action at law, not immediately compromised like a fine, but carried on through every regular stage of proceeding, I am greatly apprehensive that it's form and method will not be easily understood by the student who is not yet acquainted with the
[358] course of judicial proceedings; which cannot be thoroughly explained, till treated of at large in the third book of these commentaries. However I shall endeavour to state it's nature

[u] pag. 117. 271.

Another effect of fines, the passing the estates of married women, is commonly (as by the author, p. 355.) attributed to their private examination by the judge. Mr. Hargrave observes that if this were the cause, it might be presumed that the law would have added the same form to ordinary conveyances, and made them effectual for the same purpose. He therefore ascribes this their effect to their nature and original, as being the agreement of a real suit. Though the law would not suffer a married woman to aliene her land, yet it would not prevent a stranger from prosecuting any claim, which he might have to the estate of a woman, because she was married. From allowing her to be sued with her husband for her land, it was an easy step to allow them to compromise the suit; and then to make it certain that such compromise was the free choice of the wife, she was examined apart from him by the court. This reasoning is both ingenious and satisfactory, and I cannot but recommend the whole note to the student's attention.

and progress, as clearly and concisely as I can; avoiding, as far as possible, all technical terms and phrases not hitherto interpreted.

LET us, in the first place, suppose David Edwards[w] to be tenant of the freehold, and desirous to suffer a common recovery, in order to bar all entails, remainders, and reversions, and to convey the same in fee-simple to Francis Golding. To effect this, Golding is to bring an action against him for the lands; and he accordingly sues out a writ, called a *praecipe quod reddat*, because those were it's initial or most operative words, when the law proceedings were in Latin. In this writ the demandant Golding alleges that the defendant Edwards (here called the tenant) has no legal title to the land; but that he came into possession of it after one Hugh Hunt had turned the demandant out of it[x]. The subsequent proceedings are made up into a record or recovery roll[y], in which the writ and complaint of the demandant are first recited: whereupon the tenant appears, and calls upon one Jacob Morland, who is supposed, at the original purchase, to have warranted the title to the tenant; and thereupon he prays, that the said Jacob Morland may be called in to defend the title which he so warranted. This is called the *voucher*, *vocatio*, or calling of Jacob Morland to warranty; and Morland is called the *vouchee*. Upon this, Jacob Morland, the vouchee appears, is impleaded, and defends the title. Whereupon Golding the demandant desires leave of the court to *imparl*, or confer with the vouchee in private; which is (as usual) allowed him. And soon afterwards the demandant, Golding, returns to court, but Morland the vouchee disappears, or makes default. Whereupon judgment is given for the demandant, Golding, now called the recoveror, to recover the lands in question against the tenant, Edwards, who is now the recoveree: and Edwards has judg- [359]
ment to recover of Jacob Morland lands of equal value, in recompense for the lands so warranted by him, and now lost by his default; which is agreeable to the doctrine of warranty mentioned in the preceding chapter.[z] This is called the recompense or *recovery in value*. But Jacob Morland

[w] See Appendix, No. V. [x] § 1. [y] § 2. [z] pag. 301.

having no lands of his own, being usually the cryer of the court (who from being frequently thus vouched, is called the *common vouchee*), it is plain that Edwards has only a nominal recompense for the land so recovered against him by Golding; which lands are now absolutely vested in the said recoveror by judgment of law, and seisin thereof is delivered by the sheriff of the county. So that this collusive recovery operates merely in the nature of a conveyance in fee-simple, from Edwards the tenant in tail, to Golding the purchasor. (4)

The recovery, here described, is with a single voucher only; but sometimes it is with *double*, *treble*, or farther voucher, as the exigency of the case may require. And indeed it is now usual always to have a recovery with double voucher at the least; by first conveying an estate of freehold to any indifferent person, against whom the *praecipe is* brought; and then he vouches the tenant in tail, who vouches over the common vouchee [a]. For, if a recovery be had immediately against tenant in tail, it bars only such estate in the premises of which he is then actually seised: whereas if the recovery be had against another person, and the tenant in tail be vouched, it bars every latent right and interest which he may have in the land recovered [b]. (5) If Edwards

[a] See Appendix, pag. xviii.

[b] Bro. *Abr. tit. Taile*, 23. Plowd. Manxel's Case [8].

(4) See vol. iii p. 193.

(5) The reason upon which this distinction proceeds is very subtle; the estate which a person loses by a judgment, is that of which he is possessed at the time it passes, and the same which he, whom he vouches to warranty, is supposed to have granted him; the recovery over in value from the vouchee also applies itself to this estate; it is intelligible therefore why the issue in tail of a person, who has only an estate for life in possession with remainder in tail, and is not tenant in tail in possession, should not be barred by a recovery against him; because the judgment does not affect that estate under which they claim, nor does the recovery in value go to them. But when a person instead of being the tenant himself, comes in to warrant the tenant's estate, he is a supposed grantor, defending his grant by virtue of all the interests which he ever had, though those interests have been divested out of him, or are discontinued; every possible claimant through him is therefore affected by his warranty, and the supposed recovery over from the common vouchee will equally apply itself to a claimant in any way through him; because that estate in virtue of which

therefore be tenant of the freehold in possession, and John Barker be tenant in tail in remainder, here Edwards doth first vouch Barker, and then Barker vouches Jacob Morland the common vouchee, who is always the last person vouched, and always makes default: whereby the demandant Golding recovers the land against the tenant Edwards, and Edwards recovers a recompense of equal value against Barker the first vouchee; who recovers the like against Morland the common vouchee, against whom such ideal recovery in value is always ultimately awarded. [360]

This supposed recompense in value is the reason why the issue in tail is held to be barred by a common recovery. For if the recoveree should obtain a recompense in lands from the common vouchee (which there is a possibility in contemplation of law, though a very improbable one, of his doing), these lands would supply the place of those so recovered from him by collusion, and would descend to the issue in tail [c]. This reason will also hold with equal force, as to *most* remainder-men and reversioners; to whom the possibility will remain and revert, as a full recompense for the reality, which they were otherwise entitled to: but it will not *always* hold: and therefore, as Pigot says [d], the judges have been even *astuti*, in inventing other reasons to maintain the authority of recoveries. And, in particular, it hath been said, that though the estate tail is gone from the recoveree, yet it is not *destroyed* but only *transferred*; and still subsists, and will ever continue to subsist (by construction of law) in the recoveror, his heirs and assigns: and, as the estate tail so continues to subsist for ever, the remainders or reversions expectant on the determination of such estate-tail can never take place.

To such awkward shifts, such subtile refinements, and such strange reasoning, were our ancestors obliged to have recourse, in order to get the better of that stubborn statute

[c] Dr. & St. b. 1. dial. 26. [d] Of com. recov. 13, 14.

which he claims, will be supposed to be the estate granted by the common vouchee, and for the loss of which he pays in value. See Pigot, 109. 114.

de donis. The design for which these contrivances were set on foot, was certainly laudable; the unriveting the fetters of estates-tail, which were attended with a legion of mischiefs to the commonwealth; but, while we applaud the end we cannot admire the means. Our modern courts of justice have indeed adopted a more manly way of treating the subject, by considering common recoveries in no other light than as the formal mode of conveyance, by which tenant in tail is enabled to aliene his lands. But, since the ill consequences of fettered inheritances are now generally seen and allowed,
[361] and of course the utility and expedience of setting them at liberty are apparent; it hath often been wished that the process of this conveyance was shortened, and rendered less subject to niceties, by either totally repealing the statute *de donis*; which, perhaps, by reviving the old doctrine of conditional fees, might give birth to many litigations: or by vesting in every tenant in tail of full age [in possession] the same absolute fee-simple at once, which now he may obtain whenever he pleases, by the collusive fiction of a common recovery; though this might possibly bear hard upon those in remainder or reversion by abridging the chances they would otherwise frequently have, as no recovery can be suffered in the intervals between term and term, which sometimes continue for near five months together: or lastly, by empowering the tenant in tail to bar the estate-tail by a solemn deed, to be made in term time, and enrolled in some court of record; which is liable to neither of the other objections, and is warranted not only by the usage of our American colonies, and the decisions of our own courts of justice, which allow a tenant in tail (without fine or recovery) to appoint his estate to any *charitable* use [e], but also by the precedent of the statute [f] 21 Jac. I. c. 19., which, in case of the bankrupt tenant in tail, empowers his commissioners to sell the estate at any time, by deed indented and enrolled. And if, in so national a concern, the emoluments of the officers concerned in passing recoveries, are thought to be worthy attention, those might be provided for in the fees to be paid upon each enrolment.

[e] See pag. 376.

[f] See pag. 286.

2. The *force* and *effect* of common recoveries may appear, from what has been said, to be an absolute bar not only of all estates-tail, but of remainders and reversions expectant on the determination of such estates. So that a tenant in tail may, by this method of assurance, convey the lands held in tail to the recoveror, his heirs and assigns, absolutely free and discharged of all conditions and limitations in tail, and of all remainders and reversions. But by statute 34 & 35 Hen. VIII. c. 20., no recovery had against tenant in tail, of the king's gift, whereof the remainder or reversion is in the king, shall bar such estate-tail, or the remainder or reversion [362] of the crown. (6) And by the statute 11 Hen. VII. c. 20. no woman, after her husband's death, shall suffer a recovery of lands settled on her by her husband, or settled on her husband and her by any of his ancestors. And by statute 14 Eliz. c. 8. no tenant for life, of any sort, can suffer a recovery, so as to bind them in remainder or reversion. For which reason, if there be tenant for life, with remainder in tail, and other remainders over, and the tenant for life is desirous to suffer a valid recovery; either he or the tenant to the *praecipe* by him made, must *vouch* the remainder-man in tail, otherwise the recovery is void: but if he does vouch such remainder-man, and he appears and vouches the common vouchee, it is then good; for if a man be vouched and appears, and suffers the recovery to be had against the tenant to the *praecipe*, it is as effectual to bar the estate tail as if he himself were the recoveree [f].

In all recoveries, it is necessary that the recoveree, or tenant to the *praecipe*, as he is usually called, be actually seised of the freehold, else the recovery is void [g]. For all actions, to recover the seisin of lands, must be brought against the actual tenant of the freehold, else the suit will

[f] Salk. 571. [g] Pigot, 28.

(6) See this statute fully commented upon in Co. Litt. 372. and see the case of *Perkins* v. *Sewell*, 1 Bl. R. 654. in which an entail created by Hen. 4. was held not to be within the protection of the statute, because the estate appeared not to have been granted in reward of services, which from reference to the preamble of the statute and its connection with the enacting part, the court thought necessary.

lose its effect; since the freehold cannot be recovered of him who has it not. And though these recoveries are in themselves fabulous and fictitious, yet it is necessary that there be *actores fabulae*, properly qualified. But the nicety thought by some modern practitioners to be requisite in conveying the legal freehold, in order to make a good tenant to the *praecipe*, is removed by the provisions of the statute 14 Geo. II. c. 20. which enacts, with a retrospect and conformity to the antient rule of law [h], that though the legal freehold be vested in lessees, yet those who are entitled to the next freehold estate in remainder or reversion may make a good tenant to the *praecipe*; — that, though the deed or fine which creates such tenant be subsequent to the judgment of recovery, yet, if it be in the same term, the recovery shall be valid in law; — and that, though the recovery itself do not appear to be entered, or be not regularly entered, on record, yet the deed
[363] to make a tenant to the *praecipe*, and declare the uses of the recovery, shall after a possession of twenty years be sufficient evidence, on behalf of a purchasor for valuable consideration, that such recovery was duly suffered. And this may suffice to give the student a general idea of common recoveries, the last species of assurances by matter of record. (7)

Before I conclude this head, I must add a word concerning deeds to *lead*, or to *declare*, the *uses* of fines, and of recoveries. For if they be levied or suffered without any good consideration, and without any uses declared, they, like other conveyances, enure only to the use of him who levies or suffers them [i]. And if a consideration appears, yet as the most usual fine, "*sur cognizance de droit come ceo &c.*" conveys an absolute estate, without any limitations, to the

[h] Pigot, 41, &c. 1 Burr. 115. [i] Dyer, 18.

(7) Even without a good tenant to the præcipe, a recovery would be valid as against the parties, because they would be bound by the estoppel. Of course, therefore, a recovery so suffered by the owner of the fee would be valid, because there could be no claimant but through him, and of course none but persons bound by the estoppel. But this would not hold as against the issue of tenant in tail, because they claim not through him, but *per formam doni*, and are therefore not bound by his estoppel. Lord Say and Sele's case, 10 Mod. 15.

cognizee; and as common recoveries do the same to the recoveror; these assurances could not be made to answer the purpose of family settlements (wherein a variety of uses and designations is very often expedient,) unless their force and effect were subjected to the direction of other more complicated deeds, wherein particular uses can be more particularly expressed. The fine or recovery itself, like a power once gained in mechanics, may be applied and directed to give efficacy to an infinite variety of movements in the vast and intricate machine of a voluminous family settlement. And if these deeds are made previous to the fine or recovery, they are called deeds to *lead* the uses; if subsequent, deeds to *declare* them. As if A tenant in tail, with reversion to himself in fee, would settle his estate on B for life, remainder to C in tail, remainder to D in fee; that is what by law he has no power of doing effectually, while his own estate tail is in being. He therefore usually, after making the settlement proposed, covenants to levy a fine (or if there be any intermediate remainders to suffer a recovery) to E, and directs that the same shall enure to the uses in such settlement mentioned. This is now a deed to *lead* the uses of the fine or recovery; and the fine when levied, or recovery when suffered, shall enure to the uses so specified, and no other. For though E, the cognizee or recoveror, hath a fee-simple vested in himself by the fine or recovery; [364] yet, by the operation of this deed, he becomes a mere instrument or conduit-pipe, seised only *to the use* of B, C, and D, in successive order: which use is executed immediately, by force of the statute of uses [k]. Or, if a fine or recovery be

[k] This doctrine may perhaps be more clearly illustrated by example. In the deed or marriage settlement in the Appendix, N° II. § 2. we may suppose the lands to have been originally settled on Abraham and Cecilia Barker for life, remainder to John Barker in tail, with divers other remainders over, reversion to Cecilia Barker in fee; and now intended to be settled to the several uses therein expressed, *viz.* to Abraham and Cecilia Barker till the marriage of John Barker with Katherine Edwards, and then to John Barker for life; remainder to trustees to preserve the contingent remainders; remainder to his wife Katherine for life, for her jointure; remainder to other trustees, for a term of five hundred years; remainder to the first and other sons of the marriage in tail; remainder to the daughters in tail; remainder to John Barker in tail; remainder to Cecilia Barker in fee. Now it is necessary, in order to bar the estate-tail of John Barker, and the remainders expectant thereon, that a recovery be suffered of the premises; and it is thought proper (for though

had, without any previous settlement, and a deed be *afterwards* made between the parties, *declaring* the uses to which the same shall be applied, this will be equally good, as if it had been expressly levied or suffered in consequence of a deed directing it's operation to those particular uses. For by statute 4 & 5 Ann. c. 16. indentures to *declare* the uses of fines and recoveries, made *after* the fines and recoveries had and suffered, shall be good and effectual in law, and the fine and recovery shall enure to such uses, and be esteemed to be only in trust, notwithstanding any doubts that had arisen on the statute of frauds 29 Car. II. c. 3. to the contrary. (8)

usual it is by no means necessary see Forrester, 167.) that in order to make a good tenant of the freehold or tenant to the *praecipe*, during the coverture, a fine should be levied by Abraham, Cecilia, and John Barker; and that the recovery itself be suffered against this tenant to the *praecipe;* who shall vouch John Barker, and thereby bar his estate-tail, and become tenant to the fee-simple by virtue of such recovery; the uses of which estate so acquired are to be those expressed in this deed. Accordingly the parties covenant to do these several acts (see pag. viii.); and in consequence thereof the fine and recovery are had and suffered (N° IV. and N° V.) of which this conveyance is a deed to *lead* the uses.

(8) In a note by Mr. Sugden on Gilbert's Uses and Trusts, p. 111. 3d edit., the learned editor mistakes this passage as stating that the statute of frauds *had enacted* that all trusts should be declared in writing at, and not after the levying or suffering the fine or recovery, which created them. But the author only infers what the statute of Anne states, that doubts had arisen on the construction of the statute of frauds. Mr. Sugden observes, that by the 4 & 5 Ann. c. 16. trusts can only be declared after suffering the fine or recovery by deed; the author uses the term indentures, which is not in the statute, nor are they absolutely necessary.

The remark upon common recoveries, which Mr. Christian has cited from Willes C. J. in the case of *Martin* v. *Strachan and another*, 1 Wilson, 73. is very just

CHAPTER THE TWENTY-SECOND.

OF ALIENATION BY SPECIAL CUSTOM.

WE are next to consider assurances by special custom, obtaining only in particular places, and relative only to a particular species of real property. This therefore is a very narrow title; being confined to copyhold lands, and such customary estates as are holden in antient demesne, or in manors of a similar nature; which, being of a very peculiar kind, and originally no more than tenancies in pure or privileged villenage, were never alienable by deed; for, as that might tend to defeat the lord of his signiory, it is therefore a forfeiture of a copyhold [a]. Nor are they transferable by matter of record, even in the king's courts, but only in the court baron of the lord. The method of doing this is generally by *surrender*; though in some manors, by special custom, recoveries may be suffered of copyholds [b]: but these differing in nothing material from recoveries of free land, save only that they are not suffered in the king's courts, but in the court baron of the manor, I shall confine myself to conveyance by surrender, and their consequences.

SURRENDER, *sursumredditio*, is the yielding up of the estate by the tenant into the hands of the lord, for such purposes as in the surrender are expressed. As, it may be, to the use and behoof of A and his heirs; to the use of his own will; and the like. The process, in most manors, is, that the tenant comes to the steward, either in court, (or if the custom [366]

[a] Litt. § 77. [b] Moor. 637.

permits, out of court,) (1) or else to two customary tenants of the same manor, provided there be also a custom to warrant it; and there, by delivering up a rod, a glove, or other symbol, as the custom directs, resigns into the hands of the lord, by the hands and acceptance of his said steward, or of the said two tenants, all his interest and title to the estate; in trust to be again granted out by the lord, to such persons and for such uses as are named in the surrender, and the custom of the manor will warrant. If the surrender be made out of court, then at the next or some subsequent court, the jury or homage must present and find it upon their oaths; which presentment is an information to the lord or his steward of what has been transacted out of court. Immediately upon such surrender, in court, or upon presentment of a surrender made out of court, the lord by his steward grants the same land again to *cestuy que use* (who is sometimes, though rather improperly called the surrenderee), to hold by the antient rents and customary services; and thereupon admits him tenant to the copyhold, according to the form and effect of the surrender, which must be exactly pursued. And this is done by delivering up to the new tenant the rod, or glove, or the like, in the name, and as the symbol, of corporal seisin of the lands and tenements. Upon which admission he pays a fine to the lord according to the custom of the manor, and takes the oath of fealty.

In this brief abstract of the manner of transferring copyhold estates we may plainly trace the visible footsteps of the feodal institutions. The fief, being of a base nature and tenure, is unalienable without the knowledge and consent of the lord. For this purpose it is resigned up, or surrendered into his hands. Custom, and the indulgence of the law, which favours liberty, has now given the tenant a right to name his successor; but formerly it was far otherwise. And I am apt to suspect that this right is of much the same antiquity with the introduction of uses with respect to freehold lands; for the alienee of a copyhold had merely *jus fiduciarium*, for

(1) Even without a special custom, the lord or his steward may take surrenders out of court, or even out of the manor. *Dudfield* v. *Andrews*, 1 Salk, 184. *Tukely* v. *Hawkins*, 1 Lord Raym. 76.

which there was no remedy at law, but only by *sub-pœna* in chancery [c]. When therefore the lord had accepted a surrender of his tenant's interest, upon confidence to re-grant the estate to another person, either then expressly named or to be afterwards named in the tenant's will, the chancery enforced this trust as a matter of conscience; which jurisdiction, though seemingly new in the time of Edward IV. [d], was generally acquiesced in, as it opened the way for the alienation of copyholds, as well as of freehold estates, and as it rendered the *use* of them both equally devisable by testament. Yet, even to this day, the new tenant cannot be admitted but by composition with the lord, and paying him a fine by way of acknowledgment for the licence of alienation. Add to this the plain feodal investiture, by delivering the symbol of seisin in presence of the other tenants in open court; "*quando* "*hasta vel aliud corporeum quidlibet porrigitur à domino se* "*investituram facere dicente: quae saltem coram duobus va-*"*sallis solemniter fieri debet* [e]:" and, to crown the whole, the oath of fealty is annexed, the very bond of feodal subjection. From all which, we may fairly conclude, that had there been no other evidence of the fact in the rest of our tenures and estates, the very existence of copyholds, and the manner in which they are transferred, would incontestibly prove the very universal reception which this northern system of property for a long time obtained in this island; and which communicated itself, or at least its similitude, even to our very villeins and bondmen.

This method of conveyance is so essential to the nature of a copyhold estate, that it cannot properly be transferred by any other assurance. No feoffment or grant has any operation thereupon. If I would exchange a copyhold estate with another, I cannot do it by an ordinary deed of exchange at the common law, but we must surrender to each other's use, and the lord will admit us accordingly. If I would devise a copyhold, I must surrender it to the use of my last will and testament: and in my will I must declare my intentions, and

[c] Cro. Jac. 368.
[d] Bro. *Abr.* tit. *Tenant per copie*, 10.
[e] *Feud.* l. 2. t. 2.

name a devisee, who will then be entitled to admission [f].(2) A fine or recovery had of copyhold lands in the king's court may, indeed, if not duly reversed, alter the tenure of the lands, and convert them into frank fee [g], which is defined in the old book of tenure [h] to be "land pleadable at the common law;" but upon an action on the case, in the nature of a writ of *deceit*, brought by the lord in the king's court, such fine or recovery will be reversed, the lord will recover his jurisdiction, and the lands will be restored to their former state of copyhold [i].

[f] Co. Copyh. § 36.
[g] Old *Nat. Brev. t. briefe de recto clauso.* F.N B. 13.
[h] *t. tenur en franke fee.*
[i] See Vol. III. pag. 166.*

(2) By 55 G. 3. c 192. this necessity of a surrender to the use of a will is done away with, the devisee upon admittance paying all such stamp duties and fees, as would have been payable if the surrender had been duly made. The object of this statute was to supply that mere formal surrender, which the devisor was only prevented from making, by ignorance, accident, or sudden death, and which, in many instances, a court of equity would have supplied the want of. But it did not intend to enlarge the powers or alter the interests of copyholders, and therefore will not supply the want of any surrender, which is matter of substance. As where there was a custom in a manor, that a feme covert might devise her copyhold lands after a surrender of them, to the use of her will, by her husband and herself, she having been examined by the steward apart from her husband and consenting; this surrender accompanied by a private examination to see that there was no undue controul of the husband, was held to be a substantial protection to the wife, not within the contemplation of the statute, nor rendered unnecessary by it. *Nethercote* v. *Bartle*, 5 B. & A. 492.

The effect of this statute will be in a short time to put an end to those applications to the court of Chancery which I have alluded to above. It will be sufficient, therefore, to state generally the nature of them, and the principle on which they were granted. The application was to compel an heir at law, to whom a copyhold estate had devolved contrary to the intentions of his ancestor, to perfect those intentions as stated in the will. The intention of the testator, in order to be thus helped by a court of equity, ought to have been to do something by his will, which he was legally or morally bound to do And the court recognised three such intentions;—the payment of creditors, the providing for his widow, and for his younger children, or rather for children, whether elder or younger, who were not the customary heirs; and therefore it was in favour of these three classes of persons, that it was in the habit of interfering. See Scriven on Copyholds, 274. *Hills* v. *Downton*, 5 Ves. 557.

In order the more clearly to apprehend the nature of this peculiar assurance, let us take a separate view of its several parts; the surrender, the presentment, and the admittance.

1. A SURRENDER, by an admittance subsequent whereto the conveyance is to receive its perfection and confirmation, is rather a manifestation of the alienor's intention, than a transfer of any interest in possession. For, till admittance of *cestuy que use*, the lord taketh notice of the surrenderor as his tenant; and he shall receive the profits of the land to his own use, and shall discharge all services due to the lord. Yet the interest remains in him not absolutely, but *sub modo*: for he cannot pass away the land to any other, or make it subject to any other incumbrance than it was subject to at the time of the surrender. But no manner of legal interest is vested in the nominee before admittance. If he enters, he is a trespasser, and punishable in an action of trespass: and if he surrenders to the use of another, such surrender is merely void and by no matter *ex post facto* can be confirmed. For though he be admitted in pursuance of the original surrender, and thereby acquires afterwards a sufficient and plenary interest as absolute owner, yet his second surrender previous to his own admittance is absolutely void *ab initio*; because at the time of such surrender he had but a possibility of an interest, and could therefore transfer nothing: and no subsequent admittance can make an act good, which was *ab initio* void[k]. Yet, though upon the original surrender the nominee hath but a possibility, it is however such a possibility, as may whenever he pleases be reduced to a certainty: for he cannot either by force or fraud be deprived or deluded of the effects and fruits of the surrender; but if the lord refuse to admit him, he is compellable to do it by a bill in chancery, or a *mandamus*[k]: and the surrenderor can in no wise defeat his grant: his hands being for ever bound from disposing of the land in any other way, and his mouth for ever stopped from revoking or countermanding his own deliberate act[l]. [369]

2. As to the *presentment*; that, by the *general* custom of manors, is to be made at the next court baron immediately

[k] 2 Roll. Rep. 107. [l] Co. Copyh. § 39.

after the surrender; but by *special* custom in some places it will be good, though made at the second or other subsequent court. And it is to be brought into court by the *same* persons that took the surrender, and then to be presented by the homage; and in all points material must correspond with the true tenor of the surrender itself. And therefore, if the surrender be conditional, and the presentment be absolute, both the surrender, presentment, and admittance thereupon, are wholly void [m]: the surrender, as being never truly presented; the presentment, as being false; and the admittance, as being founded on such untrue presentment. (3) If a man surrenders out of court, and dies before presentment, and presentment be made after his death according to the custom, this is sufficient [n]. So too, if *cestuy que use* dies before presentment, yet, upon presentment made after his death, his heir according to the custom shall be admitted. The same law is, if those, into whose hands the surrender is made, die before presentment; for, upon sufficient proof in court, that such a surrender was made, the lord shall be compelled to admit accordingly. And if the steward, the tenants, or others into whose hands such surrender is made, refuse or neglect to bring it in to be presented, upon a petition preferred to the lord in his court baron, the party grieved shall find remedy. But if the lord will not do him right and justice, he may sue both the lord, and them that took the surrender, in chancery, and shall there find relief [o].

3. Admittance is the last stage, or perfection, of copyhold assurances. And this is of three sorts: first, an admittance upon a voluntary grant from the lord; secondly, an admittance upon surrender by the former tenant; and, thirdly, an admittance upon a descent from the ancestor.

[m] Co. Copyh. § 40.
[n] Co. Litt. 62.
[o] Co. Copyh. § 40.

(3) Supposing that time still remains, according to the custom of the manor, in which the surrender might be truly presented, it should seem an unsatisfactory reason for rendering void a valid surrender, that it has been falsely presented.

In admittances, even upon a *voluntary grant* from the lord, when copyhold lands have escheated or reverted to him, the lord is considered as an instrument. For though it is in his power to keep the lands in his own hands; or to dispose of them at his pleasure, by granting an absolute fee-simple, a freehold, or a chattel interest therein; and quite to change their nature from copyhold to socage tenure, so that he may well be reputed their absolute owner and lord; yet if he will still continue to dispose of them as copyhold, he is bound to observe the antient custom precisely in every point, and can neither in tenure nor estate introduce any kind of alteration; for that were to create a new copyhold: wherefore in this respect the law accounts him custom's instrument. For if a copyhold for life falls into the lord's hands, by the tenant's death, though the lord may destroy the tenure and enfranchise the land, yet if he grants it out again by copy, he can neither add to nor diminish the antient rent, nor make any the minutest variation in other respects [p]: nor is the tenant's estate, so granted, subject to any charges or incumbrances by the lord [q]. (4)

In admittance upon *surrender* of another, the lord is to no intent reputed as owner, but wholly as an instrument; and the tenant admitted shall likewise be subject to no charges or incumbrances of the lord; for his claim to the estate is solely under him that made the surrender [r].

And, as in admittances upon surrenders, so in admittances *upon descents* by the death of the ancestor, the lord is used as a mere instrument; and, as no manner of interest passes into him by the surrender of the death of his tenant, so no interest passes out of him by the act of admittance. And there- [371]

[p] Co. Copyh. § 41.
[q] 8 Rep. 63.
[r] Co. Copyh. § 41. 4 Rep. 27. Co. Litt. 59.

(4) Upon the principle that the greater estate includes the less, the lord may regrant the copyhold for a less estate than it was granted for before. As if a copyhold in fee were to escheat, it might be granted out in tail or for life. Co. Litt. 52. b.

fore neither in the one case nor the other, is any respect had to the quantity or quality of the lord's estate in the manor. For whether he be tenant in fee or for years, whether he be in possession by right or by wrong, it is not material; since the admittances made by him shall not be impeached on account of his title, because they are judicial, or rather ministerial acts, which every lord in possession is bound to perform [s].

Admittances, however, upon surrender, differ from admittances upon descent in this, that by surrender nothing is vested in *cestuy que use* before admittance, no more than in voluntary admittances; but upon descent the heir is tenant by copy immediately upon the death of his ancestor: not indeed to all intents and purposes, for he cannot be sworn on the homage nor maintain an action in the lord's court as tenant; but to most intents the law taketh notice of him as of a perfect tenant of the land instantly upon the death of his ancestor, especially where he is concerned with any stranger. He may enter into the land before admittance; may take the profits; may punish any trespass done upon the ground [t]; nay, upon satisfying the lord for his fine due upon the descent, may surrender into the hands of the lord to whatever use he pleases. For which reasons we may conclude, that the admittance of an heir is principally for the benefit of the lord, to entitle him to his fine, and not so much necessary for the strengthening and completing the heir's title. Hence indeed an observation might arise, that if the benefit, which the heir is to receive by the admittance, is not equal to the charges of the fine, he will never come in and be admitted to his copyhold in court; and so the lord may be defrauded of
[372] his fine. But to this we may reply in the words of sir Edward Coke [u], "I assure myself, if it were in the election of "the heir to be admitted or not to be admitted, he would be "best contented without admittance; but the custom of "every manor is in this point compulsory. For, either upon

[s] Co. Copyh. §41. 4 Rep. 27. 1 Rep. 140.

[t] Co. Copyh. § 41. 4 Rep. 23.

[u] Copyh. § 41.

" pain of forfeiture of their copyhold, or of incurring some " great penalty, the heirs of copyholders are inforced, in " every manor, to come into court and be admitted accord- " ing to the custom, within a short time after notice given of " their ancestor's decease."

CHAPTER THE TWENTY-THIRD.

OF ALIENATION BY DEVISE.

THE last method of conveying real property, is, by *devise*, or disposition contained in a man's last will and testament. And, in considering this subject, I shall not at present inquire into the nature of wills and testaments, which are more properly the instruments to convey personal estates; but only into the original and antiquity of devising real estates by will, and the construction of the several statutes upon which that power is now founded.

It seems sufficiently clear, that before the conquest, lands were devisable by will [a]. But, upon the introduction of the the military tenures, the restraint of devising lands naturally took place, as a branch of the feodal doctrine of non-alienation without the consent of the lord [b]. And some have questioned whether this restraint (which we may trace even from the antient Germans [c]) was not founded upon truer principles of policy, than the power of wantonly disinheriting the heir by will, and transferring the estate through the dotage or caprice of the ancestor, from those of his blood to utter strangers. For this, it is alleged, maintained the balance of property, and prevented one man from growing too big or powerful for his neighbours; since it rarely happens,
[374] that the same man is heir to many others, though by art and management he may frequently become their devisee. Thus the antient law of the Athenians directed that the estate of the deceased should always descend to his children; or, on

[a] Wright of tenures, 172.
[b] See pag. 57.
[c] *Tacit. de mor. Germ.* c. 20.

failure of lineal descendants, should go to the collateral relations: which had an admirable effect in keeping up equality, and preventing the accumulation of estates. But when Solon[d] made a slight alteration, by permitting them (though only on failure of issue) to dispose of their lands by testament, and devise away estates from the collateral heir, this soon produced an excess of wealth in some, and of poverty in others: which, by a natural progression, first produced popular tumults and dissensions; and these at length ended in tyranny, and the utter extinction of liberty; which was quickly followed by a total subversion of their state and nation. On the other hand, it would now seem hard, on account of some abuses (which are the natural consequences of free agency, when coupled with human infirmity), to debar the owner of lands from distributing them after his death as the exigence of his family affairs, or the justice due to his creditors, may perhaps require. And this power, if prudently managed, has with us a peculiar propriety; by preventing the very evil which resulted from Solon's institution, the too great accumulation of property; which is the natural consequence of our doctrine of succession by primogeniture, to which the Athenians were strangers. Of this accumulation the ill effects were severely felt even in the feodal times: but it should always be strongly discouraged in a commercial country, whose welfare depends on the number of moderate fortunes engaged in the extension of trade.

However this be, we find that by the common law of England since the conquest, no estate, greater than for term of years, could be disposed of by testament[e]; except only in Kent, and in some antient burghs, and a few particular manors, where their Saxon immunities by special indulgence subsisted[f]. And though the feodal restraint on alienations by deed vanished very early, yet this on wills continued for [375] some centuries after: from an apprehension of infirmity and imposition on the testator *in extremis*, which made such devises suspicious[g]. Besides, in devises there was wanting that general notoriety, and public designation of the successor,

[d] Plutarch. *in vita Solon.*
[e] 2 Inst. 7.
[f] Litt. § 167. 1 Inst. 111.
[g] Glanv. *l.* 7. *c.* 1.

which in descents is apparent to the neighbourhood, and which the simplicity of the common law always required in every transfer and new acquisition of property.

But when ecclesiastical ingenuity had invented the doctrine of uses as a thing distinct from the land, uses began to be devised very frequently [h], and the devisee of the use could in chancery compel it's execution. For it is observed by Gilbert [i], that, as the popish clergy then generally sate in the court of chancery, they considered that men are most liberal when they can enjoy their possessions no longer; and therefore at their death would choose to dispose of them to those, who, according to the superstition of the times, could intercede for their happiness in another world. But, when the statute of uses [j] had annexed the possession to the use, these uses, being now the very land itself, became no longer devisable: which might have occasioned a great revolution in the law of devises, had not the statute of wills been made about five years after, *viz.* 32 Hen. VIII. c. 1. explained by 34 Hen. VIII. c. 5. which enacted, that all persons being seised in fee-simple (except feme-coverts, infants, idiots, and persons of non-sane memory) might by will and testament in writing devise to any other *person*, except to bodies corporate, two-thirds of their lands, tenements, and hereditaments, held in chivalry, and the whole of those held in socage; which now, through the alteration of tenures by the statute of Charles the second, amounts to the whole of their landed property, except their copyhold tenements.

Corporations were excepted in these statutes, to prevent the extension of gifts in mortmain; but now, by construction of the statute 43 Eliz. c. 4. it is held, that a devise to a corporation for a charitable use is valid, as operating in the na-
[376] ture of an *appointment*, rather than of a *bequest*. And indeed the piety of the judges hath formerly carried them great lengths in supporting such charitable uses [k]; it being held that the statute of Elizabeth, which favours appointments to charities, supersedes and repeals all former statutes [l], and

[h] Plowd. 414.
[i] On devises, 7.
[j] 27 Hen. VIII. c. 10. See Dyer. 143.
[k] Ch. Prec. 272.
[l] Gilb. Rep. 45. 1 P. Wms. 248.

supplies all defects of assurances [m]: and therefore not only a devise to a corporation, but a devise by a copyhold tenant without surrendering to the use of his will [n], and a devise (nay even a settlement) by tenant in tail without either fine or recovery, if made to a charitable use, are good by way of appointment [o]. (1)

With regard to devises in general, experience soon shewed how difficult and hazardous a thing it is, even in matters of public utility, to depart from the rules of the common law; which are so nicely constructed and so artificially connected together, that the least breach in any one of them disorders for a time the texture of the whole. Innumerable frauds and perjuries were quickly introduced by this parliamentary method of inheritance; for so loose was the construction made upon this act by the courts of law, that bare notes in the hand-writing of another person were allowed to be good wills within the statute [p]. To remedy which, the statute of frauds and perjuries, 29 Car. II. c. 3. directs, that all devises of lands and tenements shall not only be in writing, but signed by the testator, or some other person in his presence, and by his express direction; and be subscribed, in his presence, by three or four credible witnesses. And a solemnity nearly similar is requisite for revoking a devise by writing; though the same may be also revoked by burning, cancelling, tearing, or obliterating thereof by the devisor, or in his presence and with his consent: as likewise *impliedly*, by such a great and entire alteration in the circumstances and situation of the devisor, as arises from marriage and the birth of a child [q].

[m] Duke's charit. uses, 84.
[n] Moor. 890.
[o] 2 Vern. 453. Ch. Prec. 16.
[p] Dyer, 72. Cro. Eliz. 100.
[q] Christopher *v.* Christopher, *Scacc.* 6 Jul. 1771. Spragge *v.* Stone, at the Cockpit, 27 Mar. 1773, by Wilmot, de Grey, and Parker. See pag. 502.

(1) But copyhold lands are held to be within the provisions of the statute, 9 G. 2. c 36. (see ante p. 273.); and therefore neither lands so held, nor freehold lands intailed, nor indeed any lands, interest in land, or money to be laid out in land, can now pass to charitable uses, except in the mode prescribed by that statute. See Scriven on Copyholds, 248. Bridgm. Duke on Ch. Uses, 234. *Arnold* v. *Chapman*, 1 Ves. 108. *Howson* v. *Waterton*, 3 B. & A. 149.

In the construction of this last statute, it has been adjudged that the testator's name written with his own hand, at the
[377] beginning of his will, as, "I, John Mills, do make this my "last will and testament," is a sufficient signing, without any name at the bottom [q]; though the other is the safer way. It has also been determined, that though the witnesses must all see the testator sign, or at least acknowledge the signing, yet they may do it at different times [r]. But they must all subscribe their names as witnesses *in his presence*, lest by any possibility they should mistake the instrument [s]. And, in one case determined by the court of king's bench [t] the judges were extremely strict in regard to the credibility, or rather the competency, of the witnesses: for they would not allow any legatee, nor by consequence a creditor, where the legacies and debts were charged on the real estate, to be a competent witness to the devise, as being too deeply concerned in interest not to wish the establishment of the will; for, if it were established, he gained a security for his legacy or debt from the real estate, whereas otherwise he had no claim but on the personal assets. This determination, however, alarmed many purchasers and creditors, and threatened to shake most of the titles in the kingdom, that depended on devises by will. For, if the will was attested by a servant to whom wages were due, by the apothecary or attorney whose very attendance made them creditors, or by the minister of the parish who had any demand for tithes or ecclesiastical dues, (and these are the persons most likely to be present in the testator's last illness,) and if in such case the testator had charged his real estate with the payment of his debts, the whole will, and every disposition therein, so far as related to real property, were held to be utterly void. This occasioned the statute 25 Geo. II. c. 6. which restored both the competency and the credit of such *legatees*, by declaring void all legacies given to witnesses, and thereby removing all possibility of their interest affecting their testimony. The same statute likewise established the competency of *creditors*, by directing the testimony of all such creditors to be admitted, but leaving their

[q] 3 Lev. 1.
[r] Freem. 486. 2 Ch. Cas. 109. Pr. ch. 185.
[s] 1 P. Wms. 740.
[t] Stra. 1253.

credit (like that of all other witnesses) to be considered, on a view of all the circumstances, by the court and jury before whom such will shall be contested. And in a much later case [u] the testimony of three witnesses who were creditors, was held to be sufficiently credible, though the land was charged with the payment of debts; and the reasons given on the former determination were said to be insufficient.

ANOTHER inconvenience was found to attend this new method of conveyance by devise; in that creditors by bond and other specialties, which affected the *heir* provided he had assets by descent, were now defrauded of their securities, not having the same remedy against the *devisee* of their debtor. To obviate which the statute 3 & 4 W. & M. c. 14. hath provided that all wills and testaments, limitations, dispositions, and appointments of real estates, by tenants in fee-simple or having power to dispose by will, shall (as against such creditors only) be deemed to be fraudulent and void: and that such creditors may maintain their actions jointly against both the heir and the devisee. (2)

A WILL of lands, made by the permission and under the control of these statutes, is considered by the courts of law not so much in the nature of a testament, as of a conveyance declaring the uses to which the land shall be subject: with this difference, that in other conveyances the actual *subscription* of the witnesses is not required by law [w], though it is prudent for them so to do, in order to assist their memory when living, and to supply their evidence when dead; but in devises of lands such subscription is now absolutely necessary by statute, in order to identify a conveyance, which in

[u] M. 31 Geo. II. 1 Burr. 430. [w] See pag. 307, 308.

(2) The statute makes an exception in favour of devises for the payment of just debts, and for the raising portions for younger children in pursuance of marriage settlements made *bonâ fide* before marriage. On the other hand it takes care that neither the heir at law nor the devisee shall avoid their liability by alienation of the land before action brought; and provides that in that case they shall be chargeable for the value of the land so aliened.

it's nature can never be set up till after the death of the devisor. And upon this notion, that a devise affecting lands is merely a species of conveyance, is founded this distinction between such devises and testaments of personal chattels; that the latter will operate upon whatever the testator dies possessed of, the former only upon such real estates as were his at the time of executing and publishing his will [x]. Wherefore no after-purchased lands will pass under such devise [y], unless, subsequent to the purchase or contract [z], the devisor republishes his will [a]. (3)

We have now considered the several species of common assurances, whereby a title to lands and tenements may be transferred and conveyed from one man to another. But, before we conclude this head, it may not be improper to take notice of a few general rules and maxims, which have been laid down by courts of justice, for the construction and exposition of them all. These are,

1. That the construction be *favourable*, and as near the minds and apparent intents of the parties, as the rules of law will admit [b]. For the maxims of law are, that "*verba intentioni debent inservire*;" and "*benigne interpretamur chartas propter simplicitatem laicorum*." And therefore the construction must also be *reasonable*, and agreeable to common understanding [c].

[x] 1 P. Wms. 575. 11 Mod. 148.
[y] Moor. 255. 11 Mod. 127.
[z] 1 Ch. Cas. 39. 2 Ch. Cas. 144.
[a] Salk. 238.
[b] And. 60.
[c] 1 Bulstr. 175. Hob. 304.

(3) It was long a prevailing opinion, that if a man devised particular lands by name which he had not at the time, but afterwards purchased; or devised all lands which he should die seised of, that such devises would be valid. And it is curious that Chief Justice Saunders, a consummate lawyer, under this impression devised "all lands which he had or afterwards should have in Fulham;" his executors were Holt and Pollexfen Chief Justices and Serjeant Maynard, who differed as to the validity of the devise; the Serjeant holding the opinion which is now established, and the two Chief Justices that which has been determined not to be law. *Lawrence* v. *Dodwell*, 1 Lord Raym. 438. Holt however lived to change his opinion, and the law is now settled as laid down in the text.

2. THAT *quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est* [d]: but that where the *intention* is clear, too minute a stress be not laid on the strict and precise signification of *words*; *nam qui haeret in litera, haeret in cortice.* Therefore, by a grant of a remainder a reversion may well pass, and *e converso* [e]. And another maxim of law is, that "*mala grammatica non vitiat chartam*;" neither false English nor bad Latin will destroy a deed [f]. Which perhaps a classical critic may think to be no unnecessary caution.

3. THAT the construction be made upon the entire deed, and not merely upon disjointed parts of it. "*Nam ex antecedentibus et consequentibus fit optima interpretatio* [g]." And therefore that every part of it be (if possible) made to take [380] effect: and no word but what may operate in some shape or other [h]. "*Nam verba debent intelligi cum effectu, ut res magis valeat quem pereat* [i]."

4. THAT the deed be taken most strongly against him that is the agent or contractor, and in favour of the other party. "*Verba fortius accipiuntur contra proferentem.*" As, if tenant in fee-simple grants to any one an estate for life, generally, it shall be construed an estate for the life of the grantee [j]. For the principle of self-preservation will make men sufficiently careful, not to prejudice their own interest by the too extensive meaning of their words: and hereby all manner of deceit in any grant is avoided; for men would always affect ambiguous and intricate expressions, provided they were afterwards at liberty to put their own construction upon them. But here a distinction must be taken between an indenture and a deed poll: for the words of an indenture, executed by both parties, are to be considered as the words of them both; for, though delivered as the words of one party, yet they are not his words only, because the other party hath given his consent to every one of them. But in a deed-poll, executed only by the grantor, they are the words of the grantor only, and shall be taken most strongly against

[d] 2 Saund. 167.
[e] Hob. 27.
[f] 10 Rep. 133. Co. Litt. 223. 2 Show. 334.
[g] 1 Bulstr. 101.
[h] 1 P. Wms. 457.
[i] Plowd. 156.
[j] Co. Litt. 42.

him[k]. And, in general, this rule being a rule of some strictness and rigour, is the last to be resorted to; and is never to be relied upon, but where all other rules of exposition fail[l].

5. THAT, if the words will bear two senses, one agreeable to, and another against law; that sense be preferred, which is most agreeable thereto[m]. As if tenant in tail lets a lease to have and to hold during life generally, it shall be construed to be a lease for his own life only, for that stands with the law: and not for the life of the lessee, which is beyond his power to grant.

[381] 6. THAT, in a deed, if there be two clauses so totally repugnant to each other, that they cannot stand together, the first shall be received and the latter rejected[n]; wherein it differs from a will; for there, of two such repugnant clauses the latter shall stand[o]. Which is owing to the different natures of the two instruments; for the first deed and the last will are always most available in law. Yet in both cases we should rather attempt to reconcile them[p]. (4)

7. THAT a devise be most favourably expounded, to pursue if possible the will of the devisor, who for want of advice or learning may have omitted the legal or proper phrases. And therefore many times the law dispenses with the want of words in devises, that are absolutely requisite in all other instruments. Thus a fee may be conveyed without words of inheritance[q]; and an estate-tail without words of procreation[r]. By a will also an estate may pass by mere implication, without any express words to direct it's course. As, where a man devises lands to his heir at law, after the death of his wife: here, though no estate is given to the wife in express

[k] Co. Litt. 183.
[l] Bacon's Elem. c. 3.
[m] Co. Litt. 42.
[n] Hardr. 94.
[o] Co. Litt. 112.
[p] Cro. Eliz. 420. 1 Vern. 30.
[q] See pag. 108.
[r] See pag. 115.

(4) The prevalent opinion now is, that in the case of two devises of the same estate to different persons in the same will, the latter shall not defeat the former, but both devisees shall take moieties, and have estates either in common or joint-tenancy, as the words used in the will seem to point out See Co. Litt. 112. b. Hargrave's note, 144.

terms, yet she shall have an estate for life by implication [s]; for the intent of the testator is clearly to postpone the heir till after her death; and if she does not take it, nobody else can. So also where a devise is of black-acre to A and of white-acre to B in tail, and if they both die without issue, then to C in fee; here A and B have *cross-remainders* by implication, and on the failure of either's issue, the other or his issue shall take the whole; and C's remainder over shall be postponed till the issue of both shall fail [t]. But, to avoid confusion, no such cross remainders are allowed between more than two devisees [u]; (5) and, in general, where any implications are allowed, they must be such as are *necessary* (or at least highly *probable*) and not merely *possible* implications [w]. (6) And herein there is no distinction between the rules of law and of equity; for the will, being considered in both courts in the light of a limitation of uses [x], is construed in each with equal favour and benignity, and expounded rather on it's own particular circumstances, than by any general rules of positive law. [382]

[s] H. 13 Hen. VII. 17. 1 Ventr. 376.
[t] Freem. 484.
[u] Cro. Jac. 655. 1 Ventr. 224. 2 Show. 139.
[w] Vaugh. 262.
[x] Fitzg. 236. 11 Mod. 153.

(5) This doctrine is now entirely overruled, and in one of the latest decisions on the subject, (*Doe* v. *Webb*, 1 Taunt. 234.) surprise was expressed that it had ever been established, Chambre J. observing that in the oldest case on the subject, Dyer, 303 b. cross remainders had without difficulty been implied among five. The only principle now acted on is to ascertain if possible the testator's intention, and to effectuate it so far as it can be effectuated according to the rules of law.

(6) Upon this subject, Lord Eldon has expressed himself thus, "With regard to that expression, necessary implication, I will repeat what I have before stated, from a note of Lord Hardwicke's judgment in *Coryton Hillier*, that in construing a will, conjecture must not be taken for implication, but necessary implication means not natural necessity, but so strong a probability of intention, that an intention contrary to that which is imputed to the testator cannot be supposed." 1 V. & B. 466.

Therefore if the devise were to a stranger after the death of the wife, the wife would not take any thing by implication; for then it might as well be supposed that the testator meant his heir at law to take during the wife's life, as the wife; and where that is so, the obvious title of the heir at law will be preferred, *Smartle* v *Scholar*, 2 Lev. 207.

AND thus we have taken a transient view, in this and the three preceding chapters, of a very large and diffusive subject, the doctrine of common assurances: which concludes our observations on the *title* to things real, or the means by which they may be reciprocally lost and acquired. We have before considered the *estates* which may be had in them, with regard to their duration or quantity of interest, the time of their enjoyment, and the number and connexions of the persons entitled to hold them; we have examined the *tenures*, both antient and modern, whereby those estates have been, and are now, holden: and have distinguished the object of all these inquiries, namely, things real, into the corporeal or substantial, and incorporeal or ideal *kind*; and have thus considered the rights of real property in every light wherein they are contemplated by the laws of England. A system of laws, that differs much from every other system, except those of the same feodal origin, in it's notions and regulations of landed estates; and which therefore could in this particular be very seldom compared with any other.

THE subject, which has thus employed our attention, is of very extensive use and of as extensive variety. And yet, I am afraid, it has afforded the student less amusement and pleasure in the pursuit, than the matters discussed in the preceding volume. To say the truth, the vast alterations which the doctrine of real property has undergone from the conquest to the present time; the infinite determinations upon points that continually arise, and which have been heaped one upon another for a course of seven centuries, without any order or
[383] method; and the multiplicity of acts of parliament which have amended, or sometimes only altered, the common law: these causes have made the study of this branch of our national jurisprudence a little perplexed and intricate. It hath been my endeavour principally to select such parts of it as were of the most general use, where the principles were the most simple, the reasons of them the most obvious, and the practice the least embarrassed. Yet I cannot presume that I have always been thoroughly intelligible to such of my readers, as were before strangers even to the very terms of art, which I have been obliged to make use of; though, whenever those have first occurred, I have generally attempted a short ex-

plication of their meaning. These are indeed the more numerous, on account of the different languages, which our law has at different periods been taught to speak; the difficulty arising from which will insensibly diminish by use and familiar acquaintance. And therefore I shall close this branch of our enquiries with the words of sir Edward Coke[y]: "Albeit the student shall not at any one day, do what he can, "reach to the full meaning of all that is here laid down, "yet let him no way discourage himself but proceed: for, "on some other day, in some other place," (or perhaps upon a second perusal of the same,) "his doubts will be probably removed."

[y] Proeme to 1 Inst.

CHAPTER THE TWENTY-FOURTH.

OF THINGS PERSONAL.

UNDER the name of things *personal* are included all sorts of things *moveable*, which may attend a man's person wherever he goes; and therefore, being only the objects of the law while they remain within the limits of it's jurisdiction, and being also of a perishable quality, are not esteemed of so high a nature, nor paid so much regard to by the law, as things that are in their nature more permanent and *immoveable*, as land and houses, and the profits issuing thereout. These being constantly within the reach, and under the protection of the law, were the principal favourites of our first legislators: who took all imaginable care in ascertaining the rights, and directing the disposition, of such property as they imagined to be lasting, and which would answer to posterity the trouble and pains that their ancestors employed about them; but at the same entertained a very low and contemptuous opinion of all personal estate, which they regarded as only a transient commodity. The amount of it indeed was comparatively very trifling, during the scarcity of money and the ignorance of luxurious refinements which prevailed in the feodal ages. Hence it was, that a tax of the *fifteenth*, *tenth*, or sometimes a much larger proportion, of all the moveables of the subject, was frequently laid without scruple, and is mentioned with much unconcern by our antient historians, though now it would justly alarm our opulent merchants and stockholders. And hence likewise may be derived the frequent forfeitures inflicted by the common
[385] law, of *all* a man's goods and chattels, for misbehaviours and inadvertencies that at present hardly seem to deserve so severe

a punishment. Our antient law-books, which are founded upon the feodal provisions, do not therefore often condescend to regulate this species of property. There is not a chapter in Britton or the Mirror, that can fairly be referred to this head; and the little that is to be found in Glanvil, Bracton, and Fleta, seems principally borrowed from the civilians. But of later years, since the introduction and extension of trade and commerce, which are entirely occupied in this species of property, and have greatly augmented it's quantity and of course it's value, we have learned to conceive different ideas of it. Our courts now regard a man's personalty in a light nearly, if not quite, equal to his realty: and have adopted a more enlarged and less technical mode of considering the one than the other: frequently drawn from the rules which they found already established by the Roman law, wherever those rules appeared to be well grounded and apposite to the case in question, but principally from reason and convenience, adapted to the circumstances of the times; preserving withal a due regard to antient usages, and a certain feodal tincture, which is still to be found in some branches of personal property.

But things personal, by our law, do not only include things *moveable*, but also something more: the whole of which is comprehended under the general name of *chattels*, which, sir Edward Coke says [a], is a French word signifying goods. The appellation is in truth derived from the technical Latin word *catalla*: which primarily signified only beasts of husbandry, or (as we still call them) *cattle*, but in its secondary sense was applied to all moveables in general [b]. In the *grand coustumier* of Normandy [c] a *chattel* is described as a mere moveable, but at the same time it is set in opposition to a fief or feud: so that not only goods, but whatever was not a feud, were accounted chattels. And it is in this latter, more extended, negative sense, that our law adopts it; the idea of goods, or moveables only, being not sufficiently comprehen- [386]
sive to take in every thing that the law considers as a chattel

[a] 1 Inst. 118.
[b] Dufresne, II. 409.
[c] c. 87.

interest. For since, as the commentator on the *coustumier* [d] observes, there are two requisites to make a fief or heritage, duration as to time, and immobility with regard to place; whatever wants either of these qualities is not, according to the Normans, an heritage or fief; or according to us, is not a *real* estate: the consequence of which in both laws is, that it must be a personal estate, or chattel.

Chattels therefore are distributed by the law into two kinds; chattels *real*, and chattels *personal* [e].

1. Chattels *real*, saith sir Edward Coke [f], are such as concern, or savour of, the realty; as terms for years of land, wardships in chivalry, (while the military tenures subsisted,) the next presentation to a church, estates by a statute-merchant, statute-staple, *elegit*, or the like; of all which we have already spoken. And these are called real chattels, as being interests issuing out of, or annexed to, real estates; of which they have one quality, *viz.* immobility, which denominates them *real*; but want the other, *viz.* a sufficient, legal, indeterminate duration; and this want it is, that constitutes them *chattels*. The utmost period for which they can last is fixed and determinate, either for such a space of time certain, or till such a particular sum of money be raised out of such a particular income; so that they are not equal in the eye of the law to the lowest estate of freehold, a lease for another's life: their tenants were considered upon feodal principles, as merely bailiffs or farmers; and the tenant of the freehold might at any time have destroyed their interest, till the reign of Henry VIII. [g] A freehold, which alone is a real estate, and seems (as has been said) to answer to the fief in Normandy, is conveyed by corporal investiture and livery of
[387] seisin; which gives the tenant so strong a hold of the land, that it never after can be wrested from him during his life,

[d] *Il conviendroit qu'il fust non mouvable et de duree a tousiours, fol.* 107. *a.*

[e] So too in the Norman law, *Cateux sont meubles et immeubles: si comme vrais meubles sont qui transporter se peuvent, et ensuivir le corps; immeubles sont choses qui ne peuvent ensuivir le corps, ni estre transportees, et tout ce qui n'est point en heritage. LL.* Will. Nothi, c. 4. *apud* Dufresne, II. 409.

[f] 1 Inst. 118.

[g] See page 142.

but by his own act, of voluntary transfer or of forfeiture; or else by the happening of some future contingency as in estates *pur auter vie*, and the determinable freeholds mentioned in a former chapter [h]. And even these, being of an uncertain duration, may by possibility last for the owner's life; for the law will not presuppose the contingency to happen before it actually does, and till then the estate is to all intents and purposes a life-estate, and therefore a freehold interest. On the other hand, a chattel interest in lands, which the Normans put in opposition to fief, and we to freehold, is conveyed by no seisin or corporal investiture, but the possession is gained by the mere entry of the tenant himself; and it will certainly expire at a time prefixed and determined, if not sooner. Thus a lease for years must necessarily fail at the end and completion of the term; the next presentation to a church is satisfied and gone the instant it comes into possession, that is, by the first avoidance and presentation to the living; the conditional estates by statutes and *elegit* are determined as soon as the debt is paid; and so guardianships in chivalry expired of course the moment that the heir came of age. And if there be any other chattel real, it will be found to correspond with the rest in this essential quality, that it's duration is limited to a time certain, beyond which it cannot subsist.

2. CHATTELS *personal* are, properly and strictly speaking, things *moveable*; which may be annexed to or attendant on the person of the owner, and carried about with him from one part of the world to another. Such are animals, household stuff, money, jewels, corn, garments, and every thing else that can properly be put in motion, and transferred from place to place. And of this kind of chattels it is, that we are principally to speak in the remainder of this book; having been unavoidably led to consider the nature of chattels real, and their incidents, in the former chapters, which were employed upon real estates: that kind of property being of [388] a mongrel amphibious nature, originally endowed with one only of the characteristics of each species of things: the immobility of things real, and the precarious duration of things personal.

[h] Page 120.

Chattel interests being thus distinguished and distributed, it will be proper to consider, first, the nature of that *property*, or dominion, to which they are liable; which must be principally, nay solely, referred to personal chattels: and, secondly, the *title* to that property, or how it may be lost and acquired. Of each of these in it's order.

CHAPTER THE TWENTY-FIFTH.

OF PROPERTY IN THINGS PERSONAL.

PROPERTY in chattels personal may be either in *possession*: which is where a man hath not only the right to enjoy, but hath the actual enjoyment of, the thing: or else it is in *action*; where a man hath only a bare right, without any occupation or enjoyment. And of these the former, or property in *possession*, is divided into sorts, an *absolute* and a *qualified* property.

I. FIRST, then, of property in *possession absolute*; which is where a man hath, solely and exclusively, the right, and also the occupation, of any moveable chattels; so that they cannot be transferred from him, or cease to be his, without his own act or default. Such may be all *inanimate* things, as goods, plate, money, jewels, implements of war, garments, and the like: such also may be all *vegetable* productions, as the fruit or other parts of a plant, when severed from the body of it; or the whole plant itself, when severed from the ground; none of which can be moved out of the owner's possession without his own act or consent, or at least without doing him an injury, which it is the business of the law to prevent or remedy. Of these therefore there remains little to be said.

BUT with regard to *animals* which have in themselves a principle and power of motion, and (unless particularly confined) can convey themselves from one part of the world to another, there is a great difference made with respect to their several classes, not only in our law, but in the law of nature [390]

and of all civilized nations. They are distinguished into such as are *domitae*, and such as are *ferae naturae*: some being of a *tame* and others of a *wild* disposition. In such as are of a nature tame and domestic, (as horses, kine, sheep, poultry, and the like,) a man may have as absolute a property as in any inanimate beings; because these continue perpetually in his occupation, and will not stray from his house or person, unless by accident or fraudulent enticement, in either of which cases the owner does not lose his property [a]: in which our law agrees with the laws of France and Holland [b]. The stealing, or forcible abduction, of such property as this, is also felony; for these are things of intrinsic value, serving for the food of man; or else for the uses of husbandry [c]. But in animals *ferae naturae* a man can have no absolute property.

Of all tame and domestic animals, the brood belongs to the owner of the dam or mother; the English law agreeing with the civil, that "*partus sequitur ventrem*" in the brute creation, though for the most part in the human species it disallows that maxim. And therefore in the laws of England [d], as well as Rome [e], "*si equam meam equus tuus praegnantem fecerit*, "*non est tuum sed meum quod natum est.*" And, for this Pufendorf [f] gives a sensible reason: not only because the male is frequently unknown; but also because the dam, during the time of her pregnancy, is almost useless to the proprietor, and must be maintained with greater expence and care: wherefore as her owner is the loser by her pregnancy, he ought to be the gainer by her brood. An exception to this rule is in the case of young cygnets; which belong equally to the owner of the cock and hen, and shall be divided between them [g]. But
[391] here the reasons of the general rule cease, and "*cessante* "*ratione cessat et ipsa lex:*" for the male is well-known, by his constant association with the female; and for the same reason the owner of the one doth not suffer more disadvantage, during the time of pregnancy and nurture, than the owner of the other.

[a] 2 Mod. 319.
[b] *Vin. in. Inst. l 2. tit* 1. § 15
[c] 1 Hal. P.C. 511, 512.
[d] *Bro. Abr. tit. property*, 29
[e] *Ff* 6. 1. 5.
[f] de j n & g. l 4. c 7.
[g] 7 Rep. 17

II. Other animals, that are not of a tame and domestic nature, are either not the objects of property at all, or else fall under our other division, namely, that of *qualified*, *limited*, or *special* property: which is such as is not in it's nature permanent, but may sometimes subsist, and at other times not subsist. In discussing which subject, I shall in the first place shew, how this species of property may subsist in such animals as are *ferae naturae*, or of a wild nature; and then how it may subsist in any other things, when under particular circumstances.

First then, a man may be invested with a qualified, but not an absolute, property in all creatures that are *ferae naturae*, either *per industriam*, *propter impotentiam*, or *propter privilegium*.

1. A qualified property may subsist in animals *ferae naturae per industriam hominis*: by a man's *reclaiming* and making them tame by art, industry, and education; or by so confining them within his own immediate power, that they cannot escape and use their natural liberty. And under this head some writers have ranked all the former species of animals we have mentioned, apprehending none to be originally and naturally tame, but only made so by art and custom: as horses, swine, and other cattle; which if originally left to themselves, would have chosen to rove up and down, seeking their food at large, and are only made domestic by use and familiarity: and are therefore, say they, called *mansuetа*, *quasi manui assueta*. But however well this notion may be founded, abstractedly considered, our law apprehends the most obvious distinction to be, between such animals as we generally see tame, and are therefore seldom, if ever, found wandering at large, which it calls *domitae naturae*: and such creatures as [392] are usually found at liberty, which are therefore supposed to be more emphatically *ferae naturae*, though it may happen that the latter shall be sometimes tamed and confined by the art and industry of man. Such as are deer in a park, hares or rabbits in an inclosed warren, doves in a dove-house, pheasants or partridges in a mew, hawks that are fed and commanded by their owner, and fish in a private pond or in trunks. These are no longer the property of a man, than

while they continue in his keeping or actual possession: but if at any time they regain their natural liberty, his property instantly ceases; unless they have *animum revertendi*, which is only to be known by their usual custom of returning [h]. A maxim which is borrowed from the civil law [i]; "*revertendi* "*animum videntur desinere habere tunc, cum revertendi consue-* "*tudinem deseruerint.*" The law therefore extends this possession farther than the mere manual occupation; for my tame hawk that is pursuing his quarry in my presence, though he is at liberty to go where he pleases, is nevertheless my property; for he hath *animum revertendi*. So are my pigeons, that are flying at a distance from their home, (especially of the carrier kind,) and likewise the deer that is chased out of my park or forest, and is instantly pursued by the keeper or forester; all which remain still in my possession, and I still preserve my qualified property in them. But if they stray without my knowledge, and do not return in the usual manner, it is then lawful for any stranger to take them [k]. But if a deer, or any wild animal reclaimed, hath a collar or other mark put upon him, and goes and returns at his pleasure; or if a wild swan is taken, and marked and turned loose in the river, the owner's property in him still continues, and it is not lawful for any one else to take him [l]: but otherwise, if the deer has been long absent without returning, or the swan leaves the neighbourhood. Bees also are *ferae naturae*; but, when hived and reclaimed, a man may have a qualified property in them, by the law of nature, as well as by the civil law [m]. And to the same purpose, not to say in the same words, with the civil law,
[393] speaks Bracton [n]: occupation, that is, hiving or including them, gives the property in bees; for though a swarm lights upon my tree, I have no more property in them till I have hived them, than I have in the birds which make their nests thereon; and therefore if another hives them, he shall be their proprietor: but a swarm, which fly from and out of my hive, are mine so long as I can keep them in sight, and have power to pursue them; and in these circumstances no one else is entitled to take them. But it hath been also said [o], that with us the only

[h] Bracton, *l.* 2. *c.* 1. 7 Rep. 17.
[i] *Inst.* 2. 1. 15.
[k] Finch. L. 177.
[l] Crompt. of courts, 167. 7 Rep. 16. 43 Edw. III. 24.
[m] Puff. *l.* 4. *c.* 6. § 5. *Inst.* 2. 1. 14.
[n] *l.* 2. *c.* 1. § 3.
[o] Bro. *Abr. tit. propertie*, 37. cites

ownership in bees is *ratione soli*: and the charter of the forest[r], which allows every freeman to be entitled to the honey found within his own woods, affords great countenance to this doctrine, that a qualified property may be had in bees, in consideration of the property of the soil whereon they are found.

In all these creatures, reclaimed from the wildness of their nature, the property is not absolute, but defeasible: a property, that may be destroyed if they resume their antient wildness and are found at large. For if the pheasants escape from the mew, or the fishes from the trunk, and are seen wandering at large in their proper element, they become *ferae naturae* again; and are free and open to the first occupant that hath ability to seize them. But while they thus continue my qualified or defeasible property, they are as much under the protection of the law, as if they were absolutely and indefeasibly mine; and an action will lie against any man that detains them from me, or unlawfully destroys them. It is also as much felony by common law to steal such of them as are fit for food (1), as it is to steal tame animals[q]: but not so, if they are only kept for pleasure, curiosity, or whim, as dogs, bears, cats, apes, parrots, and singing-birds[r]; because their value is not intrinsic, but depending only on the caprice of the owner[s]: though it is such an invasion of property as may amount to a civil injury, and [394] be redressed by a civil action[t]. Yet to steal a reclaimed hawk is felony both by common law and statute[u]; which seems to be a relic of the tyranny of our antient sportsmen. And, among our elder ancestors, the antient Britons, another species of

[p] 9 Hen. III. c. 13.
[q] 1 Hal. P. C. 512.
[r] Lamb. Eiren. 275.
[s] 7 Rep. 18. 8 Inst. 109.
[t] Bro. *Abr. tit. trespass*, 407.
[u] 1 Hal. P. C. 512. 1 Hawk. P. C. c. 33. 37 E. III. c 19.

(1) In all these cases, however, in which the first presumption is, that the animal is not a subject of property, it seems that it must be shown, that the thief knew that it was reclaimed; a fact to be made out by the same circumstantial evidence, by which a guilty knowledge is commonly brought home to a party, such as the place where, and the manner in which it was taken, kept, or used, the means of knowledge in the party, his denial of the fact, or giving a false account, &c. 1 Hawk. P. C. c. 33. s. 26. East's P. C. c. xvi. s. 41.

reclaimed animals, *viz.* cats, were looked upon as creatures of intrinsic value; and the killing or stealing one was a grievous crime, and subjected the offender to a fine; especially if it belonged to the king's household, and was the *custos horrei regii*, for which there was a very peculiar forfeiture [w]. And thus much of qualified property in wild animals, reclaimed *per industriam*.

2. A QUALIFIED property may also subsist with relation to animals *ferae naturae, ratione impotentiae*, on account of their own inability. As when hawks, herons, or other birds build in my trees, or coneys or other creatures make their nests or burrows in my land, and have young ones there; I have a qualified property in those young ones till such time as they can fly or run away, and then my property expires [x]: but, till then, it is in some cases trespass, and in others felony, for a stranger to take them away [y]. For here, as the owner of the land has it in his power to do what he pleases with them, the law therefore vests a property in him of the young ones, in the same manner as it does of the old ones if reclaimed and confined; for these cannot through weakness, any more than the others through restraint, use their natural liberty and forsake him. (2)

[w] "*Si quis felem, horrei regii custodem, occiderit vel furto abstulerit, felis summa cauda suspendatur, capite arenam attingente, et in eam grana tritici effundantur, usquedum summitas caudae tritico co-operiatur.*" Wotton. *L.L. Wall. l.* 3. *c.* 5. § 5. An amercement similar to which, sir Edward Coke tells us, (7 Rep. 18.) there antiently was for stealing swans; only suspending them by the beak, instead of the tail.

[x] *Carta de forest.* 9 Hen. III. c. 13.

[y] 7 Rep. 17. Lamb. Eiren. 274.

(2) The property *ratione impotentiæ* seems resolvable into the property *ratione soli*, which the author mentions in chapter twenty-seven. It may be laid down as a general rule, that the owner of land has a qualified property in all wild animals commorant on the land, which seems to be a natural result of the right, which he has to bring trespass against any one, who breaks into the land to take them. But it is more than coextensive with that right, as may be seen by the instances cited hereinafter, p. 419.

Property *ratione privilegii* suspends property *ratione soli*, and is of a still more extensive nature, because it is not taken away by a stranger's driving the animal beyond the limits of the privilege. Thus if A starts a hare in a forest or warren of B, hunts it into the ground of C, and kills it there, the property remains in B. *Sutton* v. *Moody*, 1 Ld. Ray. 250. 12 Mod. 145. *Churchyard* v. *Studdy*, 14 East, 249. See post, 419.

3. A MAN may, lastly, have a qualified property in animals, *ferae naturae, propter privilegium*: that is, he may have the privilege of hunting, taking, and killing them, in exclusion of other persons. Here he has a transient property in these [395] animals, usually called game, so long as they continue within his liberty [z]; and may restrain any stranger from taking them therein: but the instant they depart into another liberty, this qualified property ceases. The manner, in which this privilege is acquired, will be shewn in a subsequent chapter.

THE qualified property, which we have hitherto considered, extends only to animals *ferae naturae*, when either reclaimed, impotent, or privileged. Many other things may also be the objects of qualified property. It may subsist in the very elements, of fire or light, of air, and of water. A man can have no absolute permanent property in these, as he may in the earth and land; since these are of a vague and fugitive nature, and therefore can admit only of a precarious and qualified ownership, which lasts so long as they are in actual use and occupation, but no longer. If a man disturbs another, and deprives him of the lawful enjoyment of these; if one obstructs another's antient windows [a], corrupts the air of his house or gardens [b], fouls his water [c], or unpens and lets it out, or if he diverts an antient watercourse that used to run to the other's mill or meadow [d]; the law will animadvert hereon as an injury, and protect the party injured in his possession. But the property in them ceases the instant they are out of possession; for, when no man is engaged in their actual occupation, they become again common, and every man has an equal right to appropriate them to his own use.

THESE kinds of qualification in property depend upon the peculiar circumstances of the subject-matter, which is not capable of being under the absolute dominion of any proprietor. But property may also be of a qualified or special nature, on account of the peculiar circumstances of the owner, when the thing itself is very capable of absolute ownership. As in case

[a] Cro. Car. 554. Mar. 18. 5 Mod. 96. 12 Mod. 144. 9 Rep. 58.
[b] 9 Rep. 59. Lut. 92.
[c] 9 Rep. 59.
[d] 1 Leon 278. Skin. 389.

of *bailment*, or delivery of goods to another person for a particular use; as to a carrier to convey to London, to an innkeeper to secure in his inn, or the like. Here there is no absolute property in either the bailor or the bailee, the person delivering, or him to whom it is delivered: for the bailor hath only the right, and not the immediate possession; the bailee hath the possession, and only a temporary right. But it is a qualified property in them both; and each of them is entitled to an action, in case the goods be damaged or taken away: the bailee on account of his immediate possession: the bailor, because the possession of the bailee is, mediately, his possession also [e]. So also in case of goods pledged or pawned upon condition, either to repay money or otherwise; both the pledgor and pledgee have a qualified, but neither of them an absolute, property in them: the pledgor's property is conditional, and depends upon the performance of the condition of repayment, *&c.*; and so too is that of the pledgee, which depends upon it's non-performance [f]. The same may be said of goods distreined for rent, or other cause of distress: which are in the nature of a pledge, and are not, at the first taking, the absolute property of either the distreinor, or party distreined upon; but may be redeemed, or else forfeited, by the subsequent conduct of the latter. But a servant, who hath the care of his master's goods or chattels, as a butler of plate, a shepherd of sheep, and the like, hath not any property or possession either absolute or qualified, but only a mere charge or oversight [g].

Having thus considered the several divisions of property in *possession*, which subsists there only, where a man hath both the right and also the occupation of the thing; we will *proceed* next to take a short view of the nature of property in *action*, or such where a man hath not the occupation, but merely a bare right to occupy the thing in question; the possession whereof may however be recovered by a suit or action at law; from whence the thing so recoverable is called a thing, or [397] *chose in action* [h]. Thus money due on a bond is a *chose* in

[e] 1 Roll. Abr. 607.
[f] Cro. Jac. 245.
[g] 5 Inst. 108.
[h] The same idea, and the same denomination, of property prevailed in the civil law. "*Rem in bonis nostris*

action; for a property in the debt vests at the time of forfeiture mentioned in the obligation, but there is no possession till recovered by course of law. If a man promises, or covenants with me, to do any act, and fails in it, whereby I suffer damage, the recompence for this damage is a *chose* in action; for though a right to some recompence vests in me at the time of the damage done, yet what and how large such recompence shall be, can only be ascertained by verdict; and the possession can only be given me by legal judgment and execution. In the former of these cases the student will observe, that the property, or right of action, depends upon an *express* contract or obligation to pay a stated sum: and in the latter it depends upon an *implied* contract, that if the covenantor does not perform the act he engaged to do, he shall pay me the damages I sustain by this breach of covenant. And hence it may be collected, that all property in action depends entirely upon contracts, either express or implied; which are the only regular means of acquiring a *chose* in action, and of the nature of which we shall discourse at large in a subsequent chapter.

At present we have only to remark, that upon all contracts or promises, either express or implied, and the *infinite* variety of cases into which they are and may be spun out, the law gives an action of some sort or other to the party injured in case of non-performance; to compel the wrongdoer to do justice to the party with whom he has contracted, and, on failure of performing the identical thing he engaged to do, to render a satisfaction equivalent to the damage sustained. But while the thing, or it's equivalent, remains in suspense, and the injured party has only the right and not the occupation, it is called a *chose* in action; being a thing rather in *potentia* than in *esse*: though the owner may have as absolute a property in, and be as well entitled to, such things in action, as to things in possession. [398]

And, having thus distinguished the different *degree* or *quantity* of *dominion* or *property* to which things personal are subject,

" *habere intelligimur, quotiens ad recu-* " *perandum eam actionem habeamus.*" (*Ff.* 41. 1. 52.) And again, " *aeque bonis* " *adnumerabitur etiam, si quid est in* " *actionibus, petitionibus, persecutioni-* " *bus. Nam et haec in bonis esse viden-* " *tur.*" (*Ff.* 50. 16. 49.)

we may add a word or two concerning the *time* of their *enjoyment*, and the *number* of their *owners*, in conformity to the method before observed in treating of the property of things real.

First, as to the *time* of *enjoyment*. By the rules of the antient common law, there could be no future property, to take place in expectancy, created in personal goods and chattels; because, being things transitory, and by many accidents subject to be lost, destroyed, or otherwise impaired, and the exigencies of trade requiring also a frequent circulation thereof, it would occasion perpetual suits and quarrels, and put a stop to the freedom of commerce, if such limitations in remainder were *generally* tolerated and allowed. But yet in last-wills and testaments such limitations of personal goods and chattels, in remainder after a bequest for life, were permitted [i]: though originally that indulgence was only shewn, when merely the use of the goods, and not the goods themselves, was given to the first legatee [k]; the property being supposed to continue all the time in the executor of the devisor. But now that distinction is disregarded [l]: and therefore if a man either by deed or will limits his books or furniture to A. for life, with remainder over to B., this remainder is good. (3) But, where an estate-tail in things personal is given to the first or any subsequent possessor, it vests in him the total property, and no remainder over shall be permitted on such a limitation [m]. For this, if allowed, would tend to a perpetuity, as the devisee or grantee in tail of a chattel has no method of barring the entail: and therefore the law vests in him at once the entire dominion of goods, being analogous to the fee-simple which a tenant in tail may acquire in a real estate.

[399] Next, as to the *number* of *owners*. Things personal may belong to their owners, not only in severalty, but also in joint-tenancy and in common, as well as real estates. They can-

[i] 1 Equ. Cas. abr. 360.
[k] Mar. 106.
[l] 2 Freem. 206.
[m] 1 P. Wms. 290.

(3) But it is questionable, whether such a limitation by *deed* would be valid; it is usual, I believe, in such a case, to employ the intervention of trustees.

not indeed be vested in coparcenary; because they do not descend from the ancestor to the heir, which is necessary to constitute coparceners. But if a horse, or other personal chattel, be given to two or more, absolutely, they are joint-tenants hereof; and, unless the jointure be severed, the same doctrine of survivorship shall take place as in estates of lands and tenements [n]. And, in like manner, if the jointure be severed, as by either of them selling his share, the vendee and the remaining part-owner shall be tenants in common, without any *jus accrescendi* or survivorship [o]. So also, if 100*l.* be given by will to two or more, *equally to be divided* between them, this makes them tenants in common [p]; as we have formerly seen [q], the same word would have done in regard to real estates. But for the encouragement of husbandry and trade, it is held that a stock on a farm, though occupied jointly, and also a stock used in a joint undertaking, by way of partnership in trade, shall always be considered as common and not as joint property, and there shall be no survivorship therein [r].

[n] Litt. § 281. 1 Vern. 482.
[o] Litt. § 321.
[p] 1 Equ. Cas. abr. 292.
[q] pag. 193.
[r] 1 Vern. 217. Co. Litt. 182.

CHAPTER THE TWENTY SIXTH.

OF TITLE TO THINGS PERSONAL BY OCCUPANCY.

WE are next to consider the *title* to things personal, or the various means of *acquiring*, and of *losing*, such property as may be had therein: both which considerations of gain and loss shall be blended together in one and the same view, as was done in our observations upon real property; since it is for the most part impossible to contemplate the one, without contemplating the other also. And these methods of acquisition or loss are principally twelve: — 1. By occupancy. 2. By prerogative. 3. By forfeiture. 4. By custom. 5. By succession. 6. By marriage. 7. By judgment. 8. By gift or grant. 9. By contract. 10. By bankruptcy. 11. By testament. 12. By administration.

And, first, a property in goods and chattels may be acquired by *occupancy*: which we have more than once remarked [a], was the original and only primitive method of acquiring any property at all; but which has since been restrained and abridged, by the positive laws of society, in order to maintain peace and harmony among mankind. For this purpose, by the laws of England, gifts, and contracts, testaments, legacies, and administrations, have been introduced and countenanced in order to transfer and continue that property and possession in things personal, which
[401] has once been acquired by the owner. And, where such things are found without any other owner, they for the most part belong to the king by virtue of his prerogative; except

See pag. 3. 8. 258.

in some few instances, wherein the original and natural right of occupancy is still permitted to subsist, and which we are now to consider.

1. Thus, in the first place, it hath been said, that any body may seize to his own use such goods as belong to an alien enemy [b]. For such enemies, not being looked upon as members of our society, are not entitled, during their state of enmity, to the benefit or protection of the laws; and therefore every man, that has opportunity, is permitted to seize upon their chattels, without being compelled as in other cases to make restitution or satisfaction to the owner. But this, however generally laid down by some of our writers, must in reason and justice be restrained to such captors as are authorized by the public authority of the state, residing in the crown [c]; and to such goods as are brought into this country by an alien enemy, after a declaration of war, without a safe-conduct or passport. And therefore it hath been holden [d], that where a foreigner is resident in England, and afterwards a war breaks out between his country and ours, his goods are not liable to be seized. It hath also been adjudged, that if an enemy take the goods of an Englishman, which are afterwards retaken by another subject of this kingdom, the former owner shall lose his property therein, and it shall be indefeasibly vested in the second taker; unless they were retaken the same day, and the owner before sun-set puts in his claim of property [e]. Which is agreeable to the law of nations, as understood in the time of Grotius [f], even with regard to captures made at sea; which were held to be the property of the captors after a possession of twenty-four hours; though the modern authorities [g] require, that before the property can be changed, the goods must have been brought into port, and have continued a night *intra præsidia*, in a place of safe custody, so that all hope of recovering them was lost. (1) [402]

[b] Finch, L. 178.
[c] *Ibid.*
[d] Freem. 40.
[e] Bro. *Abr. tit. propertie*, 38. *forfeiture*. 57.
[f] *de j. b. & p. l.* 3. c. 6. § 3.
[g] Bynkersh. *quaest. jur. publ. I.* 4. Rocc. *de Assecur. not.* 66.

(1) The question what is a complete capture, so as to divest the owner's property, is considered by the English Law in different points of view, with reference

And, as in the goods of an enemy, so also in his *person*, a man may acquire a sort of qualified property, by taking him a prisoner in war [h]; at least till his ransom be paid [i]. (2) And

h Bro. *Abr. tit. propertie*, 18.

i We meet with a curious writ of trespass in the register (102.) for breaking a man's house, and setting such his

---

reference to different parties. 1st, As between the captor and owner, it is said that the property never changes, but that the latter may, at any distance of time, and after any solemnities passed, retake his own again. If by this is meant, that during the war he may seize his vessel or other goods wherever he can find them in an enemy's hands, and that upon recapture she will be his own again without condemnation, it is probably quite correct; but in a general sense, the terms would require some limitation; because, I conceive, after the conclusion of the war, when the right to take by force had ceased, the captor would have a good title as against the original owner, and that even, if the vessel had never been regularly condemned. This seems warranted by the decision in the case of the *Harmony*. (See Vol. III. p. 108. n. (12). She had been captured by an American, and before condemnation, recaptured after the cessation of hostilities; she was then, by a decree of the court, restored to the owner, on payment of salvage; yet upon the claim of the captors, she was decreed to be delivered up to them by the original owner.

2d, As between the captor's vendee, and the owner, I conceive the law would be the same as in the former case; except where the captor, during the war, and while the right of recapture subsisted against him, sells to a neutral, against whom the right of recapture does not subsist. In this case it is possible that the captor might be able to confer a title, though he had none himself; and it seems, that a regular condemnation of the vessel in a competent court is necessary and sufficient for that purpose. See 2 Burr. 694.

3d, As between the recaptor and the owner, if the thing taken be a ship or vessel, or any goods therein, the legislature has provided for the case by 43 G. 3. c. 160., and enacted in effect, that the recaptor can never acquire a property as against the owner, but must deliver up the thing taken on payment of salvage; which is one eighth of the value if the recapture be made by any of H. M's. ships, and one sixth if by a privateer or any other ship. Supposing the thing taken were not within the provisions of the statute, the law of nations would determine the question, and I presume the principle would be such a possession by the original captor, as destroyed all hope of recovery by the owner.

4th, As between the owner insured, and the insurer, the capture is complete, so that the former may abandon to the latter, and claim as for a total loss, the moment it is made. Whether the recovery take place before or after condemnation, will make no difference, but the insurer will then stand in the place of the insured; and be entitled to the ship or other thing on payment of the salvage. Park on Ins. 108. 7th edit.

(2) The wealth to be amassed by the ransom of prisoners of war was one of the great inducements to military service, and curious instances of the importance

this doctrine seems to have been extended to negro-servants [j], who are purchased, when captives, of the nations with whom they are at war, and are therefore supposed to continue in some degree the property of their masters who buy them: though, accurately speaking, that property (if it indeed continues,) consists rather in the perpetual *service*, than in the *body* or *person* of the captive [k].

2. Thus again, whatever moveables are found upon the surface of the earth, or in the sea, and are unclaimed by any owner, are supposed to be abandoned by the last proprietor; and, as such, are returned into the common stock and mass of things: and therefore they belong, as in a state of nature, to the first occupant or fortunate finder, unless they fall within the description of waifs or estrays, or wreck, or hidden treasure; for these, we have formerly seen [l], are vested by law in the king, and form a part of the ordinary revenue of the crown.

3. Thus too the benefit of the elements, the light, the air, and the water, can only be appropriated by occupancy. If I have an antient window overlooking my neighbour's ground, he may not erect any blind to obstruct the light: but if I build my house close to his wall, which darkens it,

prisoner at large. "*Quare domum ipsius* "*W. apud. A. (in qua idem W. quendam* "*H. Scotum per ipsum W. de guerra* "*captum tanquam prisonem suum,* "*quousque sibi de centum libris, per quas* "*idem H. redemptionem suam cum prae-* "*fato W. pro vita sua salvanda fecerat* "*satisfactum foret, detinuit*) *fregit, et* "*ipsum H. cepit et abduxit, vel quo* "*voluit abire permisit, &c.*

[j] 2 Lev. 201.

[k] Carth. 396. Ld. Raym. 147. Salk. 667.

[l] Book I. ch. 8.

---

importance which was attached to this consideration, occur in history. Thus, when the Maid of Orleans was to be brought to her disgraceful trial, the advisers of the measure thought it right to pay her captors, whose property she had become, a sum equal to what it was supposed they might be able to make by her ransom. Turner's Hist. vol. iii. p. 101. In Fenn's Letters is one from an English admiral, stating his determination to kill or drown the crews of one hundred merchantmen which he had taken, unless the council wish to preserve their lives. Vol. i. p. 213. Lingard's Hist. vol. v. 118. Sometimes in the contracts of service, the King stipulates that he should be allowed to buy captives of a certain rank from the captors at a certain price.

I cannot compel him to demolish his wall; for there the first occupancy is rather in him, than in me. If my neighbour [403] makes a tan-yard, so as to annoy and render less salubrious the air of my house or gardens, the law will furnish me with a remedy; but if he is first in possession of the air, and I fix my habitation near him, the nuisance is of my own seeking, and may continue. If a stream be unoccupied, I may erect a mill thereon, and detain the water; yet not so as to injure my neighbour's prior mill, or his meadow: for he hath by the first occupancy acquired a property in the current.

4. With regard likewise to animals *ferae naturae*, all mankind had by the original grant of the Creator a right to pursue and take any fowl or insect of the air, any fish or inhabitant of the waters, and any beast or reptile of the field: and this natural right still continues in every individual, unless where it is restrained by the civil laws of the country. And when a man has once so seized them, they become while living his *qualified* property, or if dead, are *absolutely* his own: so that to steal them, or otherwise invade this property, is, according to their respective values, sometimes a criminal offence, sometimes only a civil injury. The restrictions, which are laid upon this right, by the laws of England, relate principally to royal fish, as whale and sturgeon, and such terrestrial, aërial, or aquatic animals as go under the denomination of *game*; the taking of which is made the exclusive right of the prince, and such of his subjects to whom he has granted the same royal privilege. (3) But those animals which are not expressly so reserved, are still liable to be taken and appropriated by any of the king's subjects, upon their own territories; in the same manner as they might have taken even game itself, till these civil prohibitions were issued: there being in nature no distinction between one species of wild animals and another, between the right of acquiring property in a hare or a squirrel, in a partridge or a butterfly: but the difference, at present made, arises merely from the positive municipal law.

---

(3) See post. p. 415.

5. To this principle of occupancy also must be referred the method of acquiring a special personal property in corn growing on the ground, or other *emblements*, by any *possessor* of the land who hath sown or planted it, whether he be [404] owner of the inheritance, or of a less estate: which emblements are distinct from the real estate in the land, and subject to many, though not all, the incidents attending personal chattels.(4) They were devisable by testaments before the statute of wills [m], and at the death of the owner shall vest in his executor and not his heir; they are forfeitable by outlawry in a personal action [n]: and by the statute 11 Geo. II. c. 19. though not by the common law [o], they may be distreined for rent arrere. The reason for admitting the acquisition of this special property, by tenants who have temporary interests, was formerly given [p]; and it was extended to tenants in fee, principally for the benefit of their creditors: and therefore, though the emblements are assets in the hands of the executor, are forfeitable upon outlawry, and distreinable for rent, they are not in other respects considered as personal chattels: and particularly they are not the object of larceny before they are severed from the ground [q].

6. The doctrine of property arising from *accession* is also grounded on the right of occupancy. By the Roman law,

[m] Perk. § 512.
[n] Bro. *Abr. tit. emblements*, 21. 5 Rep. 116.
[o] 1 Roll. Abr. 666.
[p] page 122. 146.
[q] 3 Inst. 109.

(4) Mr. Christian controverts this doctrine, and I think, with justice; the right to emblements, so far from being a natural right founded on occupancy, seems to be one of the most strictly technical rights in the law. Possession and cultivation of land, indeed, while they continued, would naturally give a right to the crops and product of every kind; but this is a right to certain specified products, not to all, continued after the possession of the land, and all interest in it has ceased. The reason too is obvious, and artificial, encouragement of cultivation, by assuring to the cultivator the produce of his labour. This reason equally applies to tenant in fee, as to tenant for life, or years; it is the same thing to give a man the right of disposition, as to give him the thing itself, and when land was not devisable, the doctrine of emblements had this effect as to the crops. The oldest tenant in fee might continue to cultivate with care, secure that he might dispose of the produce as he pleased.

if any given corporeal substance received afterwards an accession by natural or by artificial means, as by the growth of vegetables, the pregnancy of animals, the embroidering of cloth, or the conversion of wood or metal into vessels and utensils, the original owner of the thing was entitled by his right of possession to the property of it under such it's state of improvement[r]: but if the thing itself, by such operation, was changed into a different species, as by making wine, oil, or bread, out of another's grapes, olives, or wheat, it belonged to the new operator; who was only to make a satisfaction to the former proprietor for the materials which he had so converted[s]. And these doctrines are implicitly copied and adopted by our Bracton[t], and have since been confirmed by
[*405] many resolutions of the courts[u]. It hath even been held, that if one takes away and clothes another's wife or son, and afterwards they return home, the garments shall cease to be his property who provided them, being annexed to the person of the child or woman[w].

7. But in the case of *confusion* of goods, where those of two persons are so intermixed that the several portions can be no longer distinguished, the English law partly agrees with, and partly differs from, the civil. If the intermixture be by consent, I apprehend that in both laws the proprietors have an interest in common, in proportion to their respective shares[x]. But if one wilfully intermixes his money, corn, or hay, with that of another man, without his approbation or knowledge, or casts gold in like manner into another's melting pot or crucible, the civil law, though it gives the sole property of the whole to him, who has not interfered in the mixture, yet allows a satisfaction to the other for what he has so improvidently lost[y]. But our law, to guard against fraud, gives the entire property, without any account, to him whose original dominion is invaded, and endeavoured to be rendered uncertain without his own consent[z].

[r] *Inst.* 2. 1. 25, 26. 31. *Ff.* 6. 1. 5.
[s] *Inst.* 2. 1. 25. 34.
[t] *l.* 2. c. 2 & 3.
[u] Bro. *Abr. tit. propertie*, 23. Moor. 20. Poph. 38.
[w] Moor. 214.
[x] *Inst.* 2. 1. 27, 28. 1 Vern. 217.
[y] *Inst.* 2. 1. 28.
[z] Poph. 38. 2 Bulstr. 325. 1 Hal. P. C. 513. 2 Vern. 516.

8. There is still another species of property, which (if it subsists by the common law) being grounded on labour and invention, is more properly reducible to the head of occupancy than any other; since the right of occupancy itself is supposed by Mr. Locke [a] and many others [b], to be founded on the personal labour of the occupant. And this is the right, which an author may be supposed to have in his own original literary compositions: so that no other person without his leave may publish or make profit of the copies. When a man by the exertion of his rational powers has produced an original work, he seems to have clearly a right to dispose of that identical work as he pleases, and any attempt to vary the disposition he has made of it, appears to be an invasion of that [406] right. Now the identity of a literary composition consists entirely in the *sentiment* and the *language*; the same conceptions, clothed in the same words, must necessarily be the same composition: and whatever method be taken of exhibiting that composition to the ear or the eye of another, by recital, by writing, or by printing, in any number of copies, or at any period of time, it is always the identical work of the author which is so exhibited; and no other man (it hath been thought) can have a right to exhibit it, especially for profit, without the author's consent. This consent may perhaps be tacitly given to all mankind, when an author suffers his work to be published by another hand, without any claim or reserve of right, and without stamping on it any marks of ownership; it being then a present to the public, like building a church or bridge, or laying out a new highway; but, in case the author sells a single book, or totally grants the copyright, it hath been supposed, in the one case, that the buyer hath no more right to multiply copies of that book for sale, than he hath to imitate for the like purpose the ticket which is bought for admission to an opera or a concert; and that in the other, the whole property, with all it's exclusive rights, is perpetually transferred to the grantee. On the other hand it is urged, that though the exclusive property of the manuscript, and all which it contains, undoubtedly belongs to the author, *before* it is printed or published; yet, from the instant of publication, the exclusive right of an author or his assigns to the

[a] on Gov. part 2. ch 5 [b] See pag. 8.

sole communication of his ideas immediately vanishes and evaporates; as being a right of too subtile and unsubstantial a nature to become the subject of property at the common law, and only capable of being guarded by positive statutes and special provisions of the magistrate.

The Roman law adjudged, that if one man wrote any thing on the paper or parchment of another, the writing should belong to the owner of the blank materials [c]: meaning thereby the mechanical operation of writing, for which it directed the [407] scribe to receive a satisfaction; for in works of genius and invention, as in painting on another man's canvas, the same law [d] gave the canvas to the painter. As to any other property in the works of the understanding, the law is silent; though the sale of literary copies, for the purposes of recital or multiplication, is certainly as antient as the times of Terence [e], Martial [f], and Statius [g]. Neither with us in England hath there been (till very lately) any final [h] determination upon the right of authors at the common law.

But whatever inherent copyright might have been supposed to subsist by the common law, the statute 8 Ann. c. 19. (amended by stat. 15 Geo. III. c. 53.) hath now declared that the author and his assigns shall have the sole liberty of printing and reprinting his works for the term of fourteen years, *and no longer* [i]; and hath also protected that property by additional penalties and forfeitures: directing farther, that if, at the end of that term, the author himself be living, the right shall then return to him for another term of the same dura-

[c] *Si in chartis membranisve tuis carmen vel historiam vel orationem Titius scripserit, hujus corporis non Titius sed tu dominus esse videris. Inst.* 2. 1. 33. See pag. 404.

[d] *Ibid.* § 34.

[e] *Prol. in Eunuch.* 20.

[f] *Epigr.* i. 67. iv. 72. xiii. 3. xiv. 194.

[g] *Juv.* vii. 83.

[h] Since this was first written, it was determined in the case of *Miller* v. *Taylor*, in *B. R. Pasch.* 9 Geo. III. 1769, that an exclusive and permanent copyright in authors subsisted by the common law. But afterwards, in the case of *Donaldson* v. *Becket*, before the house of lords, 22 *Febr.* 1774, it was held that no copyright now subsists in authors, after the expiration of the several terms created by the statute of queen Anne.

[i] By statute 15 Geo. III. c. 53. some additional privileges in this respect are granted to the universities, and certain other learned societies.

tion(5):—and a similar privilege is extended to the inventors of prints and engravings, for the term of eight-and-twenty

(5) By the 54 G. 3. c. 156. the term of copyright in the author and his assignee by instrument in writing, is extended to twenty-eight years absolutely, and for the life of the author if he survives that period; whoever violates it, is liable to a special action on the case with double costs, and forfeiture of the pirated edition to the owners of the copyright; as well as to a penalty of threepence a sheet, to be paid one moiety to the king, and the other to any informer who shall sue for it.

No subject has been more discussed, either in its general principles, or particular details, than that of literary property; the abstract and absolute rights of authors to a property in the production of their intellects was long maintained by the greatest ornaments of the bench and bar; and since the decision of that point finally in the negative, the extent to which, and the terms upon which a limited property should be granted by the legislature, have been equally matters of warm dispute. These questions do not seem finally settled.

Under the last act it is expressly provided, that the neglect to enter a work at Stationer's Hall shall not at all affect the copyright; but that neglect is punishable with a penalty to be recovered by any common informer; and the publisher is still obliged to supply eleven copies of the first edition to the British Museum, and ten other public libraries, the copy for the British Museum to be on the best paper on which the work is printed, and those for the others on the paper of which the largest impression for sale consists. It is against this regulation that the principal complaints are now made; it is said to be an oppressive tax on the publishers of expensive works, and to operate as a restraint amounting almost to a prohibition of the publication of certain works, which are very costly, and limited in the number of copies. It is probable that this question will again be submitted to the consideration of the legislature.

Upon the principle of preventing a civil injury which a court of law can only redress, the court of chancery interferes to protect the owners of copyright by issuing an injunction to restrain the sale of pirated copies, and an order to produce an account of such copies printed and sold. This has carried the greater number of cases on the subject into those courts. The principle on which the court interferes, is the protection of property; it requires, therefore, a clear title in the party complaining, as the condition of its interference. It follows from this, that the work must be of such a nature, that damages might be recovered in a court of common law for pirating it; that is, it must be a work neither of an immoral, scandalous, or libellous character. Whether the work was in manuscript or print, and whether the author did or did not intend to make a profit by its publication, is immaterial. If the right or the infringment be disputed in fact, the court will sometimes direct an issue to be tried in a court of common law, and finally sustain or dissolve the injunction according to the result of that trial. See *Walcot* v. *Walker*, 7 Ves. J. 1. *Southey* v. *Sherwood*, 2 Mer. 435.

years, by the statutes of 8 Geo. II. c. 13. and 7 Geo. III. c. 38. besides an action for damages, with double costs, by statute 17 Geo. III. c. 57. (6) All which parliamentary protections appear to have been suggested by the exception in the statute of monopolies, 21 Jac. I. c. 3. which allows a royal patent of privilege to be granted for fourteen years to any inventor of a new manufacture, for the sole working or making of the same; by virtue whereof it is held, that a temporary property therein becomes vested in the king's patentee [k]. (7)

[k] 1 Vern. 62.

It should be observed in conclusion, that the statutes of copyright are considered to have reference to British printing, and British publication. If an author prints and publishes abroad, and does not use due diligence to become the first printer and publisher here also, any third person procuring the work from abroad, may innocently print and publish it here. *Clementi* v. *Walker*, 2 B. & C. 861.

(6) The principle of these acts has been extended by the 38 G. 3. c. 71., and the 54 G. 3. c. 56. to the case of sculpture. The copyright (if it may be so called) of all models, copies, or casts, of any subject being matter of invention in sculpture or relief, is vested in the first author or his assignee, for the term of fourteen years, and fourteen more if the author is alive at the end of the first fourteen, provided the proprietor's name with the date be affixed before the first publication. Whoever violates this right, is subject to an action on the case by the proprietor, in which, besides such damages as a jury shall give, he shall pay double costs of suit; but the action must be brought within six months after discovery of the offence.

(7) I forbear to go into any analysis of the numerous cases, which are to be found in the books on the subject of patents. The two main conditions of a legal patent are implied in the text — the thing in favour of which it is granted, must be a new original invention, as brought into practice; and the patentee must furnish so clear a specification of it, that the public may be able to have the benefit of it as fully and as cheaply as the patentee himself, at the end of the fourteen years, during which he is rewarded for his ingenuity by having the sole making of it. I beg to refer the student to Sir W. D. Evan's note on the stat. of James, in his Collection of the Statutes, vol. ii. p. 3.

CHAPTER THE TWENTY SEVENTH.

OF TITLE BY PREROGATIVE AND FORFEITURE.

A SECOND method of acquiring property in personal chattels is by the *king's prerogative*: whereby a right may accrue either to the crown itself, or to such as claim under the title of the crown, as by the king's grant, or by prescription, which supposes an antient grant.

SUCH in the first place are all *tributes*, *taxes*, and *customs*, whether constitutionally inherent in the crown, as flowers of the prerogative and branches of the *census regalis* or antient royal revenue, or whether they be occasionally created by authority of parliament; of both which species of revenue we treated largely in the former volume. In these the king acquires and the subject loses a property, the instant they become due: if paid, they are a *chose* in possession; if unpaid, a *chose* in action. Hither also may be referred all forfeitures, fines, and amercements due to the king, which accrue by virtue of his antient prerogative, or by particular modern statutes: which revenues created by statute do always assimilate, or take the same nature, with the antient revenues; and may therefore be looked upon as arising from a kind of artificial or secondary prerogative. And, in either case, the owner of the thing forfeited, and the person fined or amerced, lose and part with the property of the forfeiture, fine, or amercement, the instant the king or his grantee acquires it.

IN these several methods of acquiring property by prerogative there is also this peculiar quality, that the king cannot have a *joint* property with any person in one entire chattel, [409]

or such a one as is not capable of division or separation; but where the titles of the king and a subject concur, the king shall have the whole: in like manner as the king cannot, either by grant or contract, become a joint-tenant of a chattel real with another person[a]; but by such grant or contract shall become entitled to the whole in severalty. Thus, if a horse be given to the king and a private person, the king shall have the sole property: if a bond be made to the king and a subject, the king shall have the whole penalty; the debt or duty being one single chattel[b]; and so, if two persons have the property of a horse between them, or have a joint debt owing them on bond, and one of them assigns his part to the king, or is attainted, whereby his moiety is forfeited to the crown; the king shall have the entire horse, and entire debt[c]. For, as it is not consistent with the dignity of the crown to be partner with a subject, so neither does the king ever lose his right in any instance; but where they interfere, his is always preferred to that of another person[d]: from which two principles it is a necessary consequence, that the innocent though unfortunate partner must lose his share in both the debt and the horse, or in any other chattel in the same circumstances.

THIS doctrine has no opportunity to take place in certain other instances of title by prerogative, that remain to be mentioned: as the chattels thereby vested are originally and solely vested in the crown, without any transfer or derivative assignment either by deed or law from any former proprietor. Such is the acquisition of property in wreck, in treasure-trove, in waifs, in estrays, in royal fish, in swans, and the like;
[410] which are not *transferred* to the sovereign from any former owner, but are originally *inherent* in him by the rules of law, and are derived to particular subjects, as royal franchises, by his bounty. These are ascribed to him, partly upon the particular reasons mentioned in the eighth chapter of the former book; and partly upon the general principle of their being *bona vacantia*, and therefore vested in the king, as well

[a] See pag. 184.
[b] Fitz. *Abr. t. dette*, 38. Plowd. 243.
[c] Cro. Eliz. 263. Plowd. 323. Finch. Law. 178. 10 Mod. 245.
[d] Co. Litt. 30.

to preserve the peace of the public, as in trust to employ them for the safety and ornament of the commonwealth.

THERE is also a kind of prerogative *copyright* subsisting in certain books, which is held to be vested in the crown upon different reasons. Thus, 1. The king, as the executive magistrate, has the right of promulgating to the people all acts of state and government. This gives him the exclusive privilege of printing, at his own press, or that of his grantees, all *acts of parliament*, *proclamations*, and *orders of council*. 2. As supreme head of the church, he hath a right to the publication of all *liturgies* and books of *divine service*. 3. He is also said to have a right by purchase to the copies of such *law-books*, *grammars*, and other compositions, as were compiled or translated at the expence of the crown. And upon these two last principles, combined, the exclusive right of printing the translation of the *Bible* is founded. (1)

THERE still remains another species of prerogative property, founded upon a very different principle from any that have been mentioned before; the property of such animals *ferae naturae*, as are known by the denomination of *game*, with the right of pursuing, taking, and destroying them: which is vested in the king alone, and from him derived to such of his subjects as have received the grants of a chase, a park, a free warren, or free fishery. This may lead us into

(1) It has been argued that copyright in the king and his subjects stands on the same foundation of property, and therefore that when it was determined, that no such right existed in the latter, it should have followed, that there was none in the former. See Evans' Coll. of Stat. vol. ii. p. 15. But it should be remembered, that in the case of *Donaldson* v. *Beckett*, referred to at p. 407., a majority of judges, affirmed the existence of such a right in the subject at common law, but held that it was restrained or taken away by the statute, which statute would have no operation on the same right in the king.

Lord Camden, however, treated this foundation of copyright in the crown with great contempt, and specifically as applied to the translation of the Bible. It seems perhaps, therefore, safer to rest it on those grounds of public convenience, which are the best foundations of all prerogative rights; and at all events, the right itself has now been admitted for so many centuries, that even they who oppose it in theory, confess that it cannot in practice be attacked with any success.

an inquiry concerning the original of these franchises, or royalties, on which we touched a little in a former chapter[f]; [411] the right itself being an incorporeal hereditament, though the fruits and profits of it are of a personal nature.

In the first place then we have already shewn, and indeed it cannot be denied, that by the law of nature every man, from the prince to the peasant, has an equal right of pursuing, and taking to his own use, all such creatures as are *ferae naturae*, and therefore the property of nobody, but liable to be seized by the first occupant. And so it was held by the imperial law, even so late as Justinian's time: "*Ferae* "*igitur bestiae, et volucres, et pisces, et omnia animalia quae* "*mari, cœlo, et terra nascuntur, simul atque ab aliquo capta* "*fuerint, jure gentium statim illius esse incipiunt. Quod enim* "*ante nullius est, id naturali ratione occupanti conceditur*[g]." But it follows from the very end and constitution of society, that this natural right, as well as many others belonging to man as an individual, may be restrained by positive laws enacted for reasons of state, or for the supposed benefit of the community. This restriction may be either with respect to the place, in which this right may or may not be exercised; with respect to the *animals*, that are the subject of this right; or with respect to the persons allowed or forbidden to exercise it. And, in consequence of this authority, we find that the municipal laws of many nations have exerted such power of restraint; have in general forbidden the entering on another man's grounds, for any cause, without the owner's leave; have extended their protection to such particular animals as are usually the objects of pursuit; and have invested the prerogative of hunting and taking such animals in the sovereign of the state only, and such as he shall authorise[h]. Many reasons have concurred for making these constitutions: as, 1. For the encouragement of agriculture and improvement of lands, by giving every man an exclusive dominion over his own soil. 2. For preservation of the several species of these animals, which would soon be extirpated by general liberty. 3. For prevention of idleness and dissipation in husbandmen,

[f] pp. 38, 39.
[g] *Inst.* 2. 1. 12.
[h] Puff. de j. n. & g. l. 4. c. 6. § 5 & 6.

artificers, and others of lower rank; which would be the unavoidable consequence of universal licence. 4. For prevention of popular insurrections and resistance to the government, by disarming the bulk of the people[1]; which last is a reason oftener meant than avowed by the makers of forest or game laws. Nor, certainly, in these prohibitions is there any *natural* injustice, as some have weakly enough supposed; since, as Puffendorff observes, the law does not hereby take from any man his present property, or what was already his own, but barely abridges him of one means of acquiring a future property, that of occupancy: which indeed the law of nature would allow him, but of which the laws of society have in most instances very justly and reasonably deprived him.

YET, however defensible these provisions in general may be, on the footing of reason, or justice, or civil policy, we must notwithstanding acknowledge that, in their present shape, they owe their immediate original to slavery. It is not till after the irruption of the northern nations into the Roman empire, that we read of any other prohibitions, than that natural one of not sporting on any private grounds without the owner's leave; and another of a more spiritual nature, which was rather a rule of ecclesiastical discipline, than a branch of municipal law. The Roman or civil law, though it knew no restriction as to *persons* or *animals*, so far regarded the article of *place*, that it allowed no man to hunt or sport upon another's ground, but by consent of the owner of the soil. "*Qui alienum fundum ingreditur, venandi aut aucupandi* "*gratiâ, potest a domino, si is præviderit, prohiberi ne ingrediatur*[k]." For if there can, by the law of nature, be any inchoate imperfect property supposed in wild animals before they are taken, it seems most probable to fix it in him upon whose land they are found. And as to the other restriction which relates to *persons* and not to *place*, the pontifical or canon law[l] interdicts "*venationes, et sylvaticas vagationes cum* "*canibus et accipitribus*," to all *clergymen* without distinction; grounded on a saying of St. Jerome[m] that it never is recorded [413]

[1] Warburton's Alliance, 324.
[k] *Inst.* 2. 1. § 12.
[l] *Decretal. l.* 5. *tit.* 24. *c.* 2.
[m] *Decret. part.* 1. *dist.* 34. *l.* 1.

that these diversions were used by the saints, or primitive fathers. And the canons of our Saxon church, published in the reign of king Edgar [n], concur in the same prohibition: though our secular laws, at least after the conquest, did, even in the times of popery, dispense with this canonical impediment: and spiritual persons were allowed by the common law to hunt for their recreation, in order to render them fitter for the performance of their duty: as a confirmation whereof we may observe, that it is to this day a branch of the king's prerogative, at the death of every bishop, to have his kennel of hounds, or a composition in lieu thereof [o].

But, with regard to the rise and original of our present civil prohibitions, it will be found that all forest and game laws were introduced into Europe at the same time, and by the same policy which gave birth to the feodal system; when those swarms of barbarians issued from their northern hive, and laid the foundations of most of the present kingdoms of Europe on the ruins of the western empire. For when a conquering general came to settle the economy of a vanquished country, and to part it out among his soldiers or feudatories, who were to render him military service for such donations; it behoved him, in order to secure his new acquisitions, to keep the *rustici*, or natives of the country, and all who were not his military tenants, in as low a condition as possible, and especially to prohibit them the use of arms. Nothing could do this more effectually than a prohibition of hunting and sporting: and therefore it was the policy of the conqueror to reserve this right to himself, and such on whom he should bestow it; which were only his capital feudatories or greater barons. And accordingly we find, in the feudal constitutions [p], one and the same law prohibiting the *rustici* in general from carrying arms, and also proscribing the use of nets, snares, or other engines for destroying the game.
[414] This exclusive privilege well suited the martial genius of the conquering troops, who delighted in a sport [q] which, in it's

[n] *cap.* 84. Wilk. 86.
[o] 4 Inst. 309.
[p] *Feud. l.* 2. *tit.* 27. § 5.
[q] In the laws of Jenghiz Khan, founder of the Mogul and Tartarian empire, published *A. D.* 1205. there is one which prohibits the killing of all game from March to October; that

pursuit and slaughter, bore some resemblance to war. *Vita omnis* (says Cæsar, speaking of the antient Germans) *in venationibus atque in studiis rei militaris consistit* [r]. And Tacitus in like manner observes, that *quoties bella non ineunt, multum venatibus, plus per otium transigunt* [s]. And indeed, like some of their modern successors, they had no other amusement to entertain their vacant hours; despising all arts as effeminate, and having no other learning, than was couched in such rude ditties as were sung at the solemn carousals which succeeded these antient huntings. And it is remarkable that, in those nations where the feodal policy remains the most uncorrupted, the forest or game laws continue in their highest rigour. In France all game is properly the king's; (2) and in some parts of Germany it is death for a peasant to be found hunting in the woods of the nobility [t].

With us in England also, hunting has ever been esteemed a most princely diversion and exercise. The whole island

the court and soldiery might find plenty enough in the winter, during their recess from war. (Mod. Univ. Hist. iv. 468.)

[r] *De Bell. Gall. l.* 6. *c.* 20.

[s] *c.* 15.

[t] Mattheus *de Crimin. c.* 3. *tit.* 1. Carpzov. *Practic. Saxonic, p.* 2. *c.* 84.

(2) In 1789 the antient game laws of France were repealed; according to the present system, game is not property, nor is the right of sporting unlimited. Every man who possesses landed property may sport on it, at limited times, and with a license, called a *permis de chasse*, or *port d'armes*; and any man sporting, even at those times, and with a *port d'armes*, on another's land without his permission, is liable to an action for damages, and to pay the proprietor and the commune each a fine; such fine increasing in amount if the land be inclosed, and doubled and trebled on repetition of the offence. Under certain circumstances, the arms, and even the person may be seized; but in all cases, the game killed is the property of the sportsman killing it.

For the execution of these laws there are certain officers called *gardes champêtres*, and *gardes chasse*; the former every proprietor may have for his own domains, and they answer very much to our game-keepers, the latter are public officers — the same persons often fill both functions.

The *port d'armes* seems partly a financial, partly a municipal regulation, it is paid for, as our certificate; the price in 1816 was reduced to fifteen francs. And I find that a loss of the *droit du port d'armes* is a consequence of conviction of several crimes, distinct from an incapacity of serving in the army. See Code Penal. 28. 42.

See *Manuel des Chasseurs; ou Code de la Chasse. Par Blanc St. Bonnet.* Paris 1821.

was replenished with all sorts of game in the times of the Britons; who lived in a wild and pastoral manner, without enclosing or improving their grounds, and derived much of their subsistence from the chase, which they all enjoyed in common. But when husbandry took place under the Saxon government, and lands began to be cultivated, improved, and enclosed, the beasts naturally fled into the woody and desart tracts; which were called the forests, and, having never been disposed of in the first distribution of lands, were therefore held to belong to the crown. These were filled with great plenty of game, which our royal sportsmen reserved for their
[415] own diversion, on pain of a pecuniary forfeiture for such as interfered with their sovereign. But every freeholder had the full liberty of sporting upon his own territories, provided he abstained from the king's forests: as is fully expressed in the laws of Canute [t], and of Edward the Confessor [u]: "*Sit quilibet "homo dignus venatione sua, in sylva, et in agris, sibi propriis, "et in dominio sua: et abstineat omnis homo a venariis regiis, "ubicunque pacem eis habere voluerit:*" which indeed was the antient law of the Scandinavian continent, from whence Canute probably derived it. "*Cuique enim in proprio fundo quamlibet "feram quoquo modo venari permissum* [w]."

However, upon the Norman conquest, a new doctrine took place: and the right of pursuing and taking all beasts of chase or *venary*, and such other animals as were accounted *game*, was then held to belong to the king, or to such only as were authorised under him. And this as well upon the principles of the feodal law, that the king is the ultimate proprietor of all the lands in the kingdom, they being all held of him as the chief lord, or lord paramount of the fee; and that therefore he has the right of the universal soil, to enter thereon, and to chase and take such creatures at his pleasure: as also upon another maxim of the common law, which we have frequently cited and illustrated, that these animals are *bona vacantia*, and, having no other owner, belong to the king by his prerogative. As therefore the former reason was held to vest in the king a *right* to pursue and take them any where; the

[t] c. 77.
[u] c. 36.
[w] Stiernhook *de jure Sueon. l.* 2. *c.* 8.

latter was supposed to give the king, and such as he should authorize, a *sole* and *exclusive* right.

THIS right, thus newly vested in the crown, was exerted with the utmost rigour, at and after the time of the Norman establishment; not only in the antient forests, but in the new ones which the conqueror made, by laying together vast tracts of country depopulated for that purpose, and reserved solely for the king's royal diversion; in which were exercised the [416] most horrid tyrannies and oppressions, under colour of forest law, for the sake of preserving the beasts of chase: to kill any of which, within the limits of the forest, was as penal as the death of a man. And, in pursuance of the same principle, king John laid a total interdict upon the *winged* as well as the *four-footed* creation: "*capturam avium per totam Angliam interdixit*[x]." The cruel and insupportable hardships, which these forest laws created to the subject, occasioned our ancestors to be as zealous for their reformation, as for the relaxation of the feodal rigours and the other exactions introduced by the Norman family, and accordingly we find the immunities of *carta de foresta* as warmly contended for, and extorted from the king with as much difficulty, as those of *magna carta* itself. By this charter, confirmed in parliament[y], many forests were disafforested, or stripped of their oppressive privileges, and regulations were made in the regimen of such as remained; particularly[z] killing the king's deer was made no longer a capital offence, but only punished by a fine, imprisonment, or abjuration of the realm. And by a variety of subsequent statutes, together with the long acquiescence of the crown without exerting the forest laws, this prerogative is now become no longer a grievance to the subject.

BUT, as the king reserved to himself the *forests* for his own exclusive diversion, so he granted out from time to time other tracts of lands to his subjects under the names of *chases* or *parks*[a], or gave them licence to make such in their own grounds; which indeed are smaller forests, in the hands of a subject, but not governed by the forest laws: and by the

[x] M. Paris, 303.
[y] 9 *Hen. III.*
[z] *cap.* 10.
[a] See pag. 38.

common law no person is at liberty to take or kill any beasts of chase, but such as hath an antient chase or park; unless they be also beasts of prey.

[417 As to all inferior species of game, called beasts and fowls of warren, the liberty of taking or killing them is another franchise or royalty, derived likewise from the crown, and called *free warren;* a word which signifies preservation or custody: as the exclusive liberty of taking or killing fish in a public stream or river is called a *free fishery:* of which, however, no new franchise can at present be granted, by the express provision of *magna carta*, c. 16.[b] The principal intention of granting to any one these franchises or liberties was in order to protect the game, by giving the grantee a sole and exclusive power of killing it himself, provided he prevented other persons. And no man, but he who has a chase or free warren, by grant from the crown, or prescription, which supposes one, can justify hunting or sporting upon another man's soil; nor indeed, in thorough strictness of common law, either hunting or sporting at all.

However novel this doctrine may seem, to such as call themselves *qualified* sportsmen, it is a regular consequence from what has been before delivered; that the sole right of taking and destroying game belongs exclusively to the king. This appears, as well from the historical deduction here made, as because he may grant to his subjects an exclusive right of taking them; which he could not do, unless such a right was first inherent in himself. And hence it will follow, that no person whatever, but he who has such derivative right from the crown, is by common law entitled to take or kill any beasts of chase, or other game whatsoever. It is true, that by the acquiescence of the crown, the frequent grants of free warren in antient times, and the introduction of new penalties of late by certain statutes for preserving the game, this exclusive prerogative of the king is little known or considered; every man that is exempted from these modern penalties, looking upon himself as at liberty to do what he pleases with the game; whereas the contrary is strictly true, that no man, however

[b] Mirr. c. 5. § 2. See pag. 40.

well *qualified* he may vulgarly be esteemed, has a right to encroach on the royal prerogative by the killing of game, unless he can shew a particular grant of free warren; or a prescription, which presumes a grant; or some authority under an act of parliament. As for the latter, I recollect but two instances wherein an express permission to kill game was ever given by statute; the one by 1 Jac. I. cap. 27. altered by 7 Jac. I. cap. 11. and virtually repealed by 22 & 23 Car. II. c. 25. which gave authority, so long as they remained in force, to the owners of free warren, to lords of manors, and to all freeholders having 40*l.* *per annum* in lands of inheritance, or 80*l.* for life or lives, or 400*l.* personal estate (and their servants), to take partridges and pheasants upon their own, or their master's, free warren, inheritance, or freehold: the other by 5 Ann. c. 14. which empowers lords and ladies of manors to appoint gamekeepers to kill game for the use of such lord or lady: which with some alteration still subsists, and plainly supposes such power not to have been in them before. The truth of the matter is, that these game laws (of which we shall have occasion to speak again in the fourth book of these Commentaries,) do indeed *qualify* nobody, except in the instance of a gamekeeper, to kill game; but only, to save the trouble and formal process of an action by the person injured, who perhaps too might remit the offence, these statutes inflict *additional* penalties, to be recovered either in a regular or summary way, by any of the king's subjects from certain persons of inferior rank who may be found offending in this particular. But it does not follow that persons, excused from these additional penalties, are therefore *authorized* to kill game. The circumstance of having 100*l.* *per annum*, and the rest, are not properly qualifications, but exemptions. And these persons, so exempted from the penalties of the game statutes, are not only liable to actions of trespass by the owners of the land; but also, if they kill game within the limits of any royal franchise, they are liable to the actions of such who may have the right of chase or free warren therein.

Upon the whole it appears, that the king, by his prerogative, and such persons as have, under his authority, the royal franchises of chase, park, free warren, or free fishery, are the *only* persons who may acquire any property, however [419]

fugitive and transitory, in these animals *ferae naturae*, while living; which is said to be vested in them, as was observed in a former chapter, *propter privilegium*. (3) And it must also be remembered, that such persons as may thus lawfully hunt, fish, or fowl, *ratione privilegii*, have (as has been said) only a qualified property in these animals; it not being absolute or permanent, but lasting only so long as the creatures remain within the limits of such respective franchise or liberty, and ceasing the instant they voluntarily pass out of it. It is held indeed, that if a man starts any game within his own grounds, and follows it into another's, and kills it there, the property remains in himself[c]. And this is grounded on reason and natural justice[d]: for the property consists in the possession; which possession commences by the finding it in his own liberty, and is continued by the immediate pursuit. And so if a stranger starts game in one man's chase or free warren, and hunts it into another liberty, the property continues in the owner of the chase or warren; this property arising from privilege[e], and not being changed by the act of a mere stranger. Or if a man starts game on another's private grounds and kills it there, the property belongs to him in whose ground it was killed, because it was also started there[f]. the property arising *ratione soli*. Whereas, if, after being

[c] 11 Mod. 75.
[d] Puff. de. j. n. & g. l. 4. c. 6.
[e] Lord Raym. 251.
[f] *Ibid.*

(3) Mr. Christian, in a note on this passage has, I think, successfully controverted the general doctrine laid down by the author. He has pointed out, that it cannot follow that the king and his grantees have a sole right to take game either from feudal principles, because he is the ultimate proprietor of all land, nor from the fact that animals *feræ naturæ* are *bona vacantia*. And he has cited a good deal of authority to show that at common law every person *ratione soli* had a right to take game on his own lands.

The question is not of much practical importance; on the one hand it is clear that by statute law a person unqualified cannot kill the game even on his own estate; on the other, it is equally clear by common law, that he may preserve it, and that no man, however qualified, or whatever ultimate rights he may have in the soil, unless he has the franchise of chase or free warren, can enter to destroy game without subjecting himself to an action of trespass. Even the lord of a manor cannot enter on his copyholder's land without the same consequence.

started there, it is killed in the grounds of a third person, the property belongs not to the owner of the first ground, because the property is local; nor yet to the owner of the second, because it was not started in his soil; but it vests in the person who started and killed it [g], though guilty of a trespass against both the owners.

III. I PROCEED now to a third method, whereby a title [420] to goods and chattels may be acquired and lost, *viz.* by *forfeiture*; as a punishment for some crime or misdemesnor in the party forfeiting, and as a compensation for the offence and injury committed against him to whom they are forfeited. Of forfeitures, considered as the means whereby *real* property might be lost and acquired, we treated in a former chapter [h]. It remains therefore in this place only to mention by what means, or for what offences, goods and chattels become liable to forfeiture,

IN the variety of penal laws with which the subject is at present encumbered, it were a tedious and impracticable task to reckon up the various forfeitures, inflicted by special statutes, for particular crimes and misdemesnors; some of which are *mala in se*, or offences, against the divine law, either natural or revealed; but by far the greatest part are *mala prohibita*, or such as derive their guilt merely from their prohibition by the laws of the land: such as is the forfeiture of 40*s.* per month by the statute 5 Eliz. c. 4. for exercising a trade without having served seven years as an apprentice thereto (4); and the forfeiture of 10*l.* by 9 Ann. c. 23. for printing an almanack without a stamp. I shall therefore confine myself to those offences only, by which *all* the goods and chattels of the offender are forfeited: referring the student for such, where pecuniary mulcts of different quantities are inflicted, to their several proper heads, under which very many of them have been or will be mentioned; or else to the collections of Hawkins and Burn, and other laborious

[g] Farr. 18. Lord Raym. 251. [h] See pag. 267.

(4) This is repealed by 54 G. 3. c. 96., as is the forfeiture under the statute of 9 Anne, c. 23. by subsequent stamp acts.

compilers. Indeed, as most of these forfeitures belong to the crown, they may seem as if they ought to have been referred to the preceding method of acquiring personal property, namely, by prerogative. But as, in the instance of partial forfeitures, a moiety often goes to the informer, the poor, or sometimes to other persons; and as one total forfeiture, namely, that by a bankrupt who is guilty of felony
[421] by concealing his effects, accrues entirely to his creditors, I have therefore made it a distinct head of transferring property.

Goods and chattels then are totally forfeited by conviction of *high treason* or *misprision* of treason; of *petit treason*; of *felony* in general, and particularly of *felony de se*, and of *manslaughter*; nay even by conviction of *excusable homicide*[1]; by *outlawry* for treason or felony, by conviction of *petit larceny* by *flight*, in treason or felony, even though the party be acquitted of the fact; by *standing mute*, when arraigned of *felony*; by *drawing a weapon on a judge*, or *striking* any one *in the presence of the king's courts*: by *praemunire*; by *pretended prophecies*, upon a second conviction; by *owling*: by the *residing abroad* of artificers (5); and by *challenging to fight* on account of money won at gaming. All these offences, as will more fully appear in the fourth book of these Commentaries, induce a total forfeiture of goods and chattels.

And this forfeiture commences from the time of *conviction*, not the time of committing the fact, as in forfeitures of real property. For chattels are of so vague and fluctuating a nature, that to affect them by any relation back, would be attended with more inconvenience than in the case of landed

Co Litt. 391. 2 Inst. 316. 3 Inst. 56.

---

(5) See Vol. IV. p. 160. n. (13). and 154. n. (1). But it had escaped me when the latter note was written and printed, that the offence of owling may be considered to have been expunged from the statute book by the 5 G. IV. c. 47. which repealed all the prohibiting statutes on the subject, imposing only a moderate duty on the exportation of wool, hare and coney skins, and leaving that of sheep or lambs alive, perfectly unrestrained.

estates: and part, if not the whole of them, must be expended in maintaining the delinquent, between the time of committing the fact and his conviction. Yet a fraudulent conveyance of them, to defeat the interest of the crown, is made void by statute 13 Eliz. c. 5.

CHAPTER THE TWENTY-EIGHTH.

OF TITLE BY CUSTOM.

A FOURTH method of acquiring property in things personal, or chattels, is by *custom*: whereby a right vests in some particular persons, either by the local usage of some particular place, or by the almost general and universal usage of the kingdom. It were endless should I attempt to enumerate all the several kinds of special customs, which may entitle a man to a chattel interest in different parts of the kingdom; I shall therefore content myself, with making some observations on three sorts of customary interests, which obtain pretty generally throughout most parts of the nation, and are therefore of more universal concern; viz. *heriots*, *mortuaries*, and *heir-looms*.

1. HERIOTS, which were slightly touched upon in a former chapter [a], are usually divided into two sorts, heriot-*service*, and heriot-*custom*. The former are such as are due upon a special reservation in a grant or lease of lands, and therefore amount to little more than a mere rent [b]: the latter arise upon no special reservation whatsoever, but depend merely upon immemorial usage and custom [c]. Of these therefore we are here principally to speak: and they are defined to be a customary tribute of goods and chattels, payable to the lord of the fee on the decease of the owner of the land. (1)

[a] Pag. 97. [b] 2 Saund. 166. [c] Co. Cop. § 24.

(1) By custom, a heriot may be due upon alienation, as well as on the decease of the tenant. 1 Scriven. 431.

THE first establishment, if not introduction, of compulsory heriots into England, was by the Danes: and we find in the laws of king Canute [d] the several *heregeates* or heriots specified which were then exacted by the king on the death of divers of his subjects, according to their respective dignities; from the highest *eorle* down to the most inferior *thegne* or landholder. These for the most part, consisted in arms, horses, and habiliments of war; which the word itself, according to sir Henry Spelman [e], signifies. These were delivered up to the sovereign on the death of the vasal, who could no longer use them, to be put into other hands for the service and defence of the country. And upon the plan of this Danish establishment did William the Conqueror fashion his law of reliefs, as was formerly observed [f]; when he ascertained the precise relief to be taken of every tenant in chivalry, and, contrary to the feodal custom and the usage of his own duchy of Normandy, required arms and implements of war to be paid instead of money. [g]

THE Danish compulsive heriots being thus transmuted into reliefs, underwent the same several vicissitudes as the feodal tenures, and in socage estates do frequently remain to this day in the shape of a double rent payable at the death of the tenant: the heriots which now continue among us, and preserve that name, seeming rather to be of Saxon parentage, and at first to have been merely discretionary [h]. These are now for the most part confined to copyhold tenures, and are due by custom only, which is the life of all estates by copy: and perhaps are the only instance where custom has favoured the lord. For this payment was originally a voluntary donation, or gratuitous legacy of the tenant; perhaps in acknowledgment of his having been raised a degree above villenage, when all his goods and chattels were quite at the mercy of the lord; and custom, which has on the one hand confirmed the tenant's interests in exclusion of the [424] lord's will, has on the other hand established this discretional piece of gratitude into a permanent duty. An heriot may

[d] c. 69.
[e] of feuds, c. 18.
[f] pag. 65.
[g] *LL. Gull. Conq.* c. 22, 23, 24.
[h] Lambard. Peramb. of Kent, 492.

also appertain to free land, that is held by service and suit of court; in which case it is most commonly a copyhold enfranchised, whereupon the heriot is still due by custom. Bracton [i] speaks of heriots as frequently due on the death of both species of tenants: "*est quidem alia praestatio quae nomi-*" *natur hericttum et que nullam comparationem habeat ad* "*relevium, scilicet; ubi tenens, liber vel servus, in morte sua,* "*dominum suum, de quo tenuerit, respicit de meliori averio suo,* "*vel de secundo meliori, secundum diversam locorum consuetudi-*" *nem;*" And this he adds, "*magis fit de gratia quam de* "*jure.*" in which Fleta [k] and Britton [l] agree: thereby plainly intimating the original of this custom to have been merely voluntary, as a legacy from the tenant: though now the immemorial usage has established it as of right in the lord.

This heriot is sometimes the best live beast, or *averium*, which the tenant dies possessed of (which is particularly denominated the villein's relief in the twenty-ninth law of king William the Conqueror), sometimes the best inanimate good, under which a jewel or piece of plate may be included: but it is always a *personal* chattel, which, immediately on the death of the tenant who was the owner of it, being ascertained by the option of the lord [m], becomes vested in him as his property; and is no charge upon the lands, but merely on the goods and chattels. The tenant must be the owner of it, else it cannot be due; and therefore on the death of a feme-covert no heriot can be taken; for she can have no ownership in things personal [n]. In some places there is a customary composition in money, as ten or twenty shillings in lieu of a heriot, by which the lord and tenant are both bound, if it be an indisputably antient custom; but a new composition of this sort will not bind the representatives of either party; for that amounts to the creation of a new custom, which is now impossible [o]. (2)

[i] *l.* 2. *c.* 36. § 9.
[k] *l.* 3. *c.* 18.
[l] *c.* 69.
[m] Hob. 60.
[n] Keilw. 84. 4 Leon. 239.
[o] Co. Cop. § 31.

(2) In a recent case of *Garland* v. *Iekyll*, 2 Bingh. 273., the subject of heriot custom was much considered; and some doubt was thrown upon

2. Mortuaries are a sort of ecclesiastical heriots, being a customary gift claimed by and due to the minister in very many parishes on the death of his parishioners. They seem originally to have been, like lay heriots, only a voluntary bequest to the church; being intended, as Lyndewode informs us from a constitution of archbishop Langham, as a kind of expiation and amends to the clergy for the personal tithes, and other ecclesiastical duties, which the laity in their lifetime might have neglected or forgotten to pay. For this purpose, *after*[p] the lord's heriot or best good was taken out, the second best chattel was reserved to the church as a mortuary: "*si decedens plura habuerit animalia, optimo cui de* "*jure fuerit debitum reservato, ecclesiae suae sine dolo, fraude,* "*seu contradictione qualibet, pro recompensatione subtractionis* "*decimarum personalium, necnon et oblationum, secundum* "*melius animal reservetur, post obitum, pro salute animae suae*[q]." And therefore in the laws of king Canute[r] this mortuary is called soul-scot (ꝛaplꝛceaꝛ) or *symbolum animae.* (3) And,

[p] Co. Litt. 185.

[q] *Provinc. l.* 1. *tit.* 3.

[r] *c.* 13. Wilk. 130.

---

the notion that heriots were originally rather matter of favour than of right, as not being reconcileable with the state of things at their first origin, when not only the land, but also the personal property of the tenant (he being a villein) was the property of the lord. It was observed that the heir alone rendered the heriot, and the court threw it out as a conjecture, that the custom was referable to a state of society, still existing in some other countries, in which an inferior approaching a superior to ask a favour, always offered a gift; and that, so considered, a heriot was more analogous to a relief, a species of tribute paid by the heir to the lord in order to secure his protection, and to induce the lord to confer on him the interest which had been determined by the decease of his former tenant.

The important point determined in the case was this, that though where a tenement subject to heriot custom was divided, a heriot, being an entire thing, would be due in respect of each portion; yet when it was reunited, the several heriots would cease (there being no special custom to preserve them alive) and only one would be payable. This determination over-rules the decision of the court of K. B. in the case of *Attree* v. *Scutt*, 6 East. 476.

(3) In the chapter of Canute's laws, just referred to by the author, the expression is, *æquissimum est ut pecunia sepulchralis semper concedatur ad apertum sepulchrum.* The expression is almost precisely the same in the *Liber Constitutionum* of Ethelred. Wilk. 114. In the *Consilium Ænhamense*, the payment is called *animæ census*, and is directed as before, to be paid *ad apertum sepulchrum.* Wilk. 121.

in pursuance of the same principle, by the laws of Venice, where no personal tithes have been paid during the life of the party, they are paid at his death out of his merchandize, jewels, and other moveables[s]. So also, by a similar policy, in France, every man that died without bequeathing a part of his estate to the church, which was called *dying without confession*, was formerly deprived of Christian burial: or, if he died intestate, the relations of the deceased, jointly with the bishop, named proper arbitrators to determine what he ought to have given to the church, in case he had made a will. But the parliament, in 1409, redressed this grievance[t].

It was antiently usual in this kingdom to bring the mortuary to church along with the corpse when it came to be buried; and thence[u] it is sometimes called a *corse-present*: a term which bespeaks it to have been once a voluntary dona-
[426] tion. However in Bracton's time, so early as Henry III., we find it rivetted into an established custom: insomuch that the bequests of heriots and mortuaries were held to be necessary ingredients in every testament of chattels. "*Imprimis autem* "*debet quilibet, qui testamentum facerit, dominum suum de me-*"*liori re quam habuerit recognoscere; et postea ecclesiam de* "*alia meliori:*" the lord must have the best good left him as an heriot, and the church the second best as a mortuary. But yet this custom was different in different places: "*quibusdam* "*locis habet ecclesia melius averium de consuetudine; vel se-*"*cundum, vel tertium melius; in quibusdam nihil: et ideo con-*"*sideranda est consuetudo loci*[w]." This custom still varies in different places, not only as to the mortuary to be paid, but the person to whom it is payable. In Wales a mortuary or corse-present was due upon the death of every clergyman to the bishop of the diocese; till abolished, upon a recompence given to the bishop, by the stat. 12 Ann. st. 2. c. 6. And in the archdeaconry of Chester, a custom also prevailed, that the bishop, who is also archdeacon, should have, at the death of every clergyman dying therein, his best horse or mare, bridle, saddle, and spurs, his best gown or cloak, hat, upper

[s] Panormitan. *ad Decretal. l.* 3. *t.* 20. *c.* 32.
[t] Sp. L. b. 28. c. 41.
[u] Selden, Hist. of tithes, c. 10.
[w] Bracton, *l.* 2. *c.* 26. Flet. *l.* 2. *c.* 57.

garment under his gown, and tippet, and also his best signet or ring[x]. But by statute 28 Geo. II. c. 6. this mortuary is directed to cease, and the act has settled upon the bishop an equivalent in its room. The king's claim to many goods, on the death of all prelates in England, seems to be of the same nature: though sir Edward Coke[y] apprehends, that this is a *duty due upon death* and not a *mortuary*: a distinction which seems to be without a difference. For not only the king's ecclesiastical character, as supreme ordinary, but also the species of the goods claimed, which bear so near a resemblance to those in the archdeaconry of Chester, which was an acknowledged mortuary, puts the matter out of dispute. The king, according to the record vouched by sir Edward Coke, is entitled to six things: the bishop's best horse or palfrey, with his furniture; his cloak, or gown, and tippet; his cup [427] and cover; his bason and ewer; his gold ring; and, lastly, his *muta canum*, his mew or kennel of hounds; as was mentioned in the preceding chapter.[z]

This variety of customs, with regard to mortuaries, giving frequently a handle to exactions on the one side, and frauds or expensive litigations on the other; it was thought proper by statute 21 Hen. VIII. c. 6. to reduce them to some kind of certainty. For this purpose it is enacted, that all mortuaries or corse-presents to parsons of any parish, shall be taken in the following manner; unless where by custom less or none at all is due: *viz.* for every person who does not leave goods to the value of ten marks, nothing: for every person who leaves goods to the value of ten marks and under thirty pounds, 3*s.* 4*d.*; if above thirty pounds and under forty pounds, 6*s.* 8*d.*; if above forty pounds, of what value soever they may be, 10*s.* and no more. And no mortuary shall throughout the kingdom be paid for the death of any femecovert; nor for any child; nor for any one of full age, that is not a housekeeper; nor for any wayfaring man; but such wayfaring man's mortuary shall be paid in the parish to which he belongs. And upon this statute stands the law of mortuaries to this day.

[x] Cro. Car. 237.
[y] 2 Inst. 491.
[z] pag. 413

3. Heir-looms are such goods and personal chattels, as contrary to the nature of chattels, shall go by special custom to the heir along with the inheritance, and not to the executor of the last proprietor. The termination *loom* is of Saxon original; in which language it signifies a limb or member [a]; so that an heir-loom is nothing else but a limb or member of the inheritance. They are generally such things as cannot be taken away without damaging or dismembering the freehold: otherwise the general rule is, that no chattel interest whatsoever shall go to the heir, notwithstanding it be expressly limited to a man and his heirs, but shall vest in the executor [b]. But deer in a real authorised park, fishes in a
[428] pond, doves in a dove-house, &c. though in themselves personal chattels, yet are so annexed to and so necessary to the well-being of the inheritance, that they shall accompany the land wherever it vests, by either descent or purchase [c]. For this reason also I apprehend it is, that the antient jewels of the crown are held to be heir-looms [d]; for they are necessary to maintain the state, and support the dignity, of the sovereign for the time being. Charters likewise, and deeds, court-rolls, and other evidences of the land, together with the chests in which they are contained, shall pass together with the land to the heir, in the nature of heir-looms, and shall not go to the executor. [e] (4) By special custom also, in some places, carriages, utensils, and other household implements, may be heir-looms [f]; but such custom must be strictly proved. On the other hand, by almost general custom, whatever is strongly fixed to the freehold or inheritance, and cannot be severed from thence without violence or damage, "*quod ab aedibus non facile revellitur*[g];" is become a member of the inheritance, and shall thereupon pass to the heir; as

[a] Spelm. *Gloss.* 277.
[b] Co. Litt. 388.
[c] *Ibid.* 8.
[d] *Ibid.* 18.
[e] Bro. *Abr. tit. chattelles*, 18.
[f] Co. Litt. 18. 185.
[g] Spelm. *Gloss.* 277.

(4) It is perhaps hardly worth observing, that Brook makes a distinction between a chest sealed (and I suppose locked) or not; if it be not sealed up, the executor is to have it. The same distinction is taken in argument in Plowd. p. 323.

chimney-pieces, pumps, old fixed or dormant tables, benches, and the like [h]. A very similar notion to which prevails in the duchy of Brabant; where they rank certain things moveable among those of the immoveable kind, calling them by a very particular appellation, *praedia volantia*, or volatile estates; such as beds, tables, and other heavy implements of furniture, which (as an author of their own oberves) "*dignitatem istam* "*nacta sunt, ut villis, sylvis, et aedibus, aliisque praediis, com-* "*parentur; quod solidiora mobilia ipsis aedibus ex destinatione* "*patrisfamilias cohaerere videantur, et pro parte ipsarum aedium* "*aestimentur* [i]."

Other personal chattels there are, which also descend to the heir in the nature of heir-looms, as a monument or tombstone in a church, or the coat-armour of his ancestor there hung up, with the pennons and other ensigns of honour, [429] suited to his degree. In this case, albeit the freehold of the church is in the parson, and these are annexed to that freehold, yet cannot the parson or any other take them away or deface them, but is liable to an action from the heir [k]. Pews in a church are somewhat of the same nature, which may descend by custom immemorial (without any ecclesiastical concurrence) from the ancestor to the heir [l]. But though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring any civil action against such as indecently at least, if not impiously, violate and disturb their remains, when dead and buried. The parson, indeed, who has the freehold of the soil, may bring an action of trespass against such as dig and disturb it; and if any one in taking up a dead body steals the shroud or other apparel, it will be felony [m]; for the property thereof remains in the executor, or whoever was at the charge of the funeral.

But to return to heir-looms; these, though they be mere chattels, yet cannot be devised away from the heir by will;

[h] 12 Mod. 520.

[i] Stockman's *de jure devolutionis*, c. 3. § 16.

[k] 12 Rep. 105. Co. Litt. 18.

[l] 3 Inst. 202. 12 Rep. 105.

[m] 3 Inst. 110. 12 Rep. 113. 1 Hal. P. C. 515.

but such a devise is void [n], even by a tenant in fee-simple. (5) For though the owner might during his life have sold or disposed of them, as he might of the timber of the estate, since as the inheritance was his own, he might mangle or dismember it as he pleased; yet they being at his death instantly vested in the heir, the devise (which is subsequent and not to take effect till *after* his death) shall be postponed to the custom, whereby they have already descended.

[n] 1 Co. Litt. 185.

(5) That is, if the inheritance, to which they are attached, be allowed to descend to him; but if that be devised away, the heir-looms, I conceive, would go with it to the devisee.

CHAPTER THE TWENTY-NINTH.

OF TITLE BY SUCCESSION, MARRIAGE, AND JUDGMENT.

IN the present chapter we shall take into consideration three other species of title to goods and chattels.

V. THE fifth method therefore of gaining a property in chattels, either personal or real, is by *succession*: which is, in strictness of law, only applicable to corporations aggregate of many, as dean and chapter, mayor and commonalty, master and fellows, and the like; in which one set of men may, by succeeding another set, acquire a property in all the goods, moveables, and other chattels of the corporation. The true reason whereof is, because in judgment of law a corporation never dies: and therefore the predecessors, who lived a century ago, and their successors now in being, are one and the same body corporate [a]. Which identity is a property so inherent in the nature of a body politic, that, even when it is meant to give any thing to be taken in succession by such a body, that succession need not be expressed: but the law will of itself imply it. So that a gift to such a corporation, either of lands or of chattels, without naming their successors, vests an absolute property in them so long as the corporation subsists [b]. And thus a lease for years, an obligation, a jewel, a flock of sheep, or other chattel interest, will vest in the [431] successors, by succession, as well as in the identical members to whom it was originally given.

[a] 4 Rep. 65. [b] Bro. *Abr. t. estates*, 90. Cro. Eliz. 464.

But, with regard to sole corporations, a considerable distinction must be made. For if such sole corporation be the representative of a number of persons; as the master of an hospital, who is a corporation for the benefit of the poor brethren: an abbot, or prior, by the old law before the reformation, who represented the whole convent; or the dean of some antient cathedral, who stands in the place of and represents, in his corporate capacity, the chapter; such sole corporations as these have, in this respect, the same powers as corporations aggregate have, to take personal property or chattels in succession. And therefore a bond to such a master, abbot, or dean, and his successors, is good in law; and the successor shall have the advantage of it, for the benefit of the aggregate society, of which he is in law the representative [c]. Whereas in the case of sole corporations, which represent no others but themselves, as bishops, parsons, and the like, no chattel interest can regularly go in succession: and therefore if a lease for years be made to the bishop of Oxford and his successors, in such case his executors or administrators, and not his successors, shall have it. [d] For the word *successors*, when applied to a person in his political capacity, is equivalent to the word *heirs* in his natural; and as such a lease for years, if made to John and his heirs, would not vest in his heirs but his executors; so if it be made to John bishop of Oxford and his successors, who are the heirs of his body politic, it shall still vest in his executors and not in such of his successors. The reason of this is obvious: for besides that the law looks upon goods and chattels as of too low and perishable a nature to be limited either to heirs, or such successors as are equivalent to heirs; it would also follow, that if any such chattel interest (granted to a sole corporation and his successors) were allowed to descend to such successor, the property thereof must be in abeyance from the
[432] death of the present owner until the successor be appointed: and this is contrary to the nature of a chattel interest, which can never be in abeyance or without an owner [e]; but a man's right therein, when once suspended, is gone for ever. This is not the case in corporations aggregate, where the right is never in suspense; nor in the other sole corporations before

[c] Dyer, 48. Cro. Eliz. 464. [d] Co. Litt. 46. [e] Brownl. 132.

mentioned, who are rather to be considered as heads of an aggregate body, than subsisting merely in their own right: the chattel interest, therefore, in such a case, is really and substantially vested in the hospital, convent, chapter, or other aggregate body; though the head is the visible person in whose name every act is carried on, and in whom every interest is therefore said (in point of form) to vest. But the general rule, with regard to corporations merely sole, is this, that no chattel can go to or be acquired by them in right of succession[f].

YET to this rule there are two exceptions. One in the case of the king, in whom a chattel may vest by a grant of it formerly made to a preceding king and his successors[g]. The other exception is, where, by a *particular* custom, some *particular* corporations sole have acquired a power of taking *particular* chattel interests in succession. And this custom, being against the general tenor of the common law, must be strictly interpreted, and not extended to any other chattel interests than such immemorial usage will strictly warrant. Thus the chamberlain of London, who is a corporation sole, may by the custom of London take *bonds* and *recognizances* to himself and his successors, for the benefit of the orphan's fund[h]: but it will not follow from thence, that he has a capacity to take a *lease for years* to himself and his successors for the same purpose; for the custom extends not to that: nor that he may take a *bond* to himself and his successors, for any other purpose than the benefit of the orphan's fund; for that also is not warranted by the custom. Wherefore, upon the whole, we may close this head with laying down this general rule, that such right of succession to chattels is universally inherent by the common law in all aggregate corporations, in [433] the king, and in such single corporations as represent a number of persons; and may, by special custom, belong to certain other sole corporations for some particular purposes; although generally, in sole corporations, no such right can exist. (1)

[f] Co. Litt. 46.
[g] *Ibid.* 90.
[h] 4 Rep. 65. Cro. Eliz. 464. 682.

(1) Thus the ornaments of the chapel of a preceding bishop belong to his

VI. A SIXTH method of acquiring property in goods and chattels is by *marriage*; whereby those chattels, which belonged formerly to the wife, are by act of law vested in the husband, with the same degree of property and with the same powers, as the wife, when sole, had over them.

THIS depends entirely on the notion of an unity of person between the husband and wife: it being held that they are one person in law[i], so that the very being and existence of the woman is suspended during the coverture, or entirely merged or incorporated in that of the husband. And hence it follows, that whatever personal property belonged to the wife, before marriage, is by marriage absolutely vested in the husband. In a real estate, he only gains a title to the rents and profits during coverture: for that, depending upon feodal principles, remains entire to the wife after the death of her husband, or to her heirs, if she dies before him; unless by the birth of a child, he becomes tenant for life by the curtesy. But, in chattel interests, the sole and absolute property vests in the husband, to be disposed of at his pleasure, if he chooses to take possession of them; for, unless he reduces them to possession, by exercising some act of ownership upon them, no property vests in him, but they shall remain to the wife, or to her representatives, after the coverture is determined.

THERE is therefore a very considerable difference in the acquisition of this species of property by the husband, according to the subject-matter; *viz.* whether it be a chattel *real* or
[434] a chattel *personal*; and, of chattels personal, whether it be in *possession*, or in *action* only. A *chattel real* vests in the husband, not absolutely, but *sub modo*. As, in case of a lease for years, the husband shall receive all the rents and profits of it, and may, if he pleases, sell, surrender, or dispose of it during coverture[k]: if he be outlawed or attainted, it shall be forfeited to the king[l]: it is liable to execution for his debts[m]: and, if

[i] See book I. c. 15.
[k] Co. Litt. 46.
[l] Plowd. 263.
[m] Co. Litt. 351.

---

his successor, and the bishop may take such chattels in succession. 12 Rep. 106. *Corven*'s case, citing 21 E. 3. 48.

he survives his wife, it is to all intents and purposes his own [n]. Yet, if he has made no disposition thereof in his lifetime, and dies before his wife, he cannot dispose of it by will [o]: for, the husband having made no alteration in the property during his life, it never was transferred from the wife; but after his death she shall remain in her antient possession, and it shall not go to his executors. So it is also of chattels personal (or *choses*) in *action*: as debts upon bond, contracts, and the like: these the husband may have if he pleases; that is, if he reduces them into possession by receiving or recovering them at law. And, upon such receipt or recovery they are absolutely and entirely his own; and shall go to his executors or administrators, or as he shall bequeath them by will, and shall not revest in the wife. But if he dies before he has recovered or reduced them into possession, so that at his death they still continue *choses in action*, they shall survive to the wife; for the husband never exerted the power he had of obtaining an exclusive property in them [p]. And so, if an estray comes into the wife's franchise, and the husband seizes it, it is absolutely his property, but if he dies without seizing it, his executors are not now at liberty to seize it, but the wife or her heirs [q]; for the husband never exerted the right he had, which right determined with the coverture. Thus, in both these species of property the law is the same, in case the wife survives the husband; but, in case the husband survives the wife, the law is very different with respect to *chattels real* and *choses in action*: for he shall have the *chattel real* by survivorship, but [435] not the *chose in action* [r]; except in the case of arrears for rent, due to the wife before her coverture, which in case of her death are given to the husband by statute 32 Hen. VIII. c. 37. (2) And the reason for the general law is this: that

[n] Co. Litt. 300.
[o] Poph. 5. Co. Litt. 351.
[p] Co. Litt. 351.
[q] *Ibid.*
[r] 3 Mod. 186.

(2) The words of the statute do not seem to import this, but they were so construed in *Ognel's* case. 4 Rep. 51.

The distinction between the wife's chattels real, and her choses in action, where the husband survives, is become unimportant, since the 29 C. 2. c. 3. has given the husband administration of all her personal property of every description for his own benefit. And even supposing him to die after her,

the husband is in absolute possession of the *chattel real* during the coverture, by a kind of joint tenancy with his wife; wherefore the law will not wrest it out of his hands, and give it to her representatives; though, in case he had died first, it would have survived to the wife, unless he had thought proper in his life-time to alter the possession. But a *chose in action* shall not survive to him, because he never was in possession of it at all during the coverture; and the only method he had to gain possession of it, was by suing in his wife's right; but as, after her death he cannot (as husband) bring an action in her right, because they are no longer one and the same person in law, therefore he can never (as such) recover the possession. But he still will be entitled to be her administrator; and may, in that capacity, recover such things in action as became due to her before or during the coverture.

Thus, and upon these reasons, stands the law between husband and wife, with regard to *chattels real* and *choses in action*: but, as to *chattels personal* (or *choses*) *in possession*, which the wife hath in her own right, as ready money, jewels, household goods, and the like, the husband hath therein an immediate and absolute property, devolved to him by the marriage, not only potentially but in fact, which never can again revest in the wife or her representatives[a]. (3)

And, as the husband may thus generally acquire a property in all the personal substance of the wife, so in one particular

[a] Co. Litt. 351.

---

and before he has reduced her choses in action into possession, *his* personal representative will be entitled to them, and not her next of kin. *Elliott* v. *Collyer*, 1 Wils. 168.

(3) As the law, which thus gives a husband, either directly or indirectly, a power to vest in himself all his wife's personal property during coverture, might often bear hard upon the wife in cases where no settlement had been made on her; equity will always interpose, where it has jurisdiction, to protect the wife; that is, wherever the property is so circumstanced that the husband is obliged to have recourse to a court of equity for the reducing it into possession, that court will only interfere on condition of his making a competent settlement on his wife, unless indeed the free consent of the wife is satisfactorily ascertained to the court. See the cases collected in Mr. Butler's Notes to Co. Litt. 351. a. n. 304.

instance the wife may acquire a property in some of her husband's goods; which shall remain to her after his death and not go to his executors. These are called her *paraphernalia*; which is a term borrowed from the civil law[t], and is derived [436] from the Greek language, signifying something over and above her dower. Our law uses it to signify the apparel and ornaments of the wife, suitable to her rank and degree; and therefore even the jewels of a peeress usually worn by her, have been held to be *paraphernalia*[u]. These she becomes entitled to at the death of her husband, over and above her jointure or dower, and preferably to all other representatives[w]. Neither can the husband devise by his will such ornaments and jewels of his wife; though during his life perhaps he hath the power (if unkindly inclined to exert it) to sell them or give them away[x]. But if she continues in the use of them till his death, she shall afterwards retain them against his executors and administrators, and all other persons, except creditors where there is a deficiency of assets[y]. And her necessary apparel is protected even against the claim of creditors[z].

VII. A JUDGMENT, in consequence of some suit or action in a court of justice, is frequently the means of vesting the right and property of chattel interests in the prevailing party. And here we must be careful to distinguish between property, the *right* of which is before vested in the party, and of which only *possession* is recovered by suit or action; and property, to which a man before had no determinate title or certain claim, but he gains as well the right as the possession by the process and judgment of the law. Of the former sort are all debts and *choses in action*; as if a man gives bond for 20*l*., or agrees to buy a horse at a stated sum, or takes up goods of a tradesman upon an implied contract to pay as much as they are reasonably worth: in all these cases the right accrues to the creditor, and is completely vested in him, at the time of the bond being sealed, or the contract or agreement made; and the law only gives him a remedy to recover the possession of that right, [437] which already in justice belongs to him. But there is also a

[t] *Ff.* 23. 3. 9. § 3.
[u] Moor, 213.
[w] Cro. Car. 343. 1 Roll. Abr. 911. 2 Leon. 166.
[x] Noy's Max. c. 49. Grahme v. Ld. Londonderry, 24 Nov. 1746. Canc.
[y] 1 P. Wms. 730.
[z] Noy's Max. c. 49.

species of property to which a man has not any claim or title whatsoever, till after suit commenced and judgment obtained in a court of law: where the right and the remedy do not follow each other, as in common cases, but accrue at one and the same time: and where, before judgment had, no man can say that he has any absolute property, either in possession or in action. Of this nature are,

1. Such penalties as are given by particular statutes, to be recovered in an action *popular*; or, in other words, to be recovered by him or them that will sue for the same. Such as the penalty of 500*l.*, which those persons are by several acts of parliament made liable to forfeit, that being in particular offices or situations in life, neglect to take the oaths to the government: which penalty is given to him or them that will sue for the same. Now here it is clear that no particular person, A or B, has any right, claim, or demand, in or upon this penal sum, till after action brought[a]; for he that brings his action, and can *bonâ fide* obtain judgment first, will undoubtedly secure a title to it, in exclusion of every body else. He obtains an inchoate imperfect degree of property, by commencing his suit: but it is not consummated till judgment; for, if any collusion appears, he loses the priority he had gained[b]. But, otherwise, the right so attaches in the first informer, that the king (who before action brought may grant a pardon which shall be a bar to all the world) cannot after suit commenced remit any thing but his own part of the penalty[c]. For by commencing the suit the informer has made the popular action his own private action, and it is not in the power of the crown, or of any thing but parliament, to release the informer's interest. This therefore is one instance, where
[438] a suit and judgment at law are not only the means of recovering, but also of acquiring, property. And what is said of this one penalty is equally true of all others, that are given thus at large to a common informer, or to any person that will sue for the same. They are placed, as it were, in a state of nature, accessible by all the king's subjects, but the acquired right of none of them; open therefore to the first occupant, who de-

[a] 2 Lev. 141. Stra. 1169. Combe v. Pitt, B. R. Tr. 3 Geo. III. 3 Burr. 1423.

[b] Stat. 4 Hen. VII. c. 20.

[c] Cro. Eliz. 138. 11 Rep. 65.

clares his intention to possess them by bringing his action; and who carries that intention into execution, by obtaining judgment to recover them.

2. ANOTHER species of property, that is acquired and lost by suit and judgment at law, is that of *damages* given to a man by a jury, as a compensation and satisfaction for some injury sustained; as for a battery, for imprisonment, for slander, or for trespass. Here the plaintiff has no certain demand till after verdict; but when the jury has assessed his damages, and judgment is given thereupon, whether they amount to twenty pounds or twenty shillings, he instantly acquires, and the defendant loses at the same time, a right to that specific sum. It is true, that this is not an acquisition so perfectly original as in the former instance: for here the injured party has unquestionably a vague and indeterminate right to some damages or other the instant he receives the injury; and the verdict of the jurors, and judgment of the court thereupon, do not in this case so properly vest a *new* title in him, as fix and ascertain the *old* one; they do not *give*, but *define*, the right. But, however, though strictly speaking, the primary right to a satisfaction for injuries is given by the law of nature, and the suit is only the means of ascertaining and recovering that satisfaction; yet, as the legal proceedings are the only visible means of this acquisition of property, we may fairly enough rank such damages, or satisfaction assessed, under the head of property acquired by suit and judgment at law.

3. HITHER also may be referred, upon the same principle, [439] all title to costs and expences of suit; which are often arbitrary, and rest entirely on the determination of the court, upon weighing all circumstances, both as to the *quantum*, and also (in the courts of equity especially, and upon motions in the courts of law) whether there shall be any costs at all. These costs, therefore, when given by the court to either party, may be looked upon as an acquisition made by the judgment of law.

CHAPTER THE THIRTIETH.

OF TITLE BY GIFT, GRANT, AND CONTRACT.

WE are now to proceed, according to the order marked out, to the discussion of two of the remaining methods of acquiring a title to property in things personal, which are much connected together, and answer in some measure to the conveyances of real estates; being those by *gift* or *grant*, and by *contract*: whereof the former vests a property in *possession*, the latter a property in *action*.

VIII. Gifts then, or *grants*, which are the eighth method of transferring personal property, are thus to be distinguished from each other, that *gifts* are always gratuitous, *grants* are upon some consideration or equivalent; and they may be divided, with regard to their subject-matter, into gifts or grants of chattels *real*, and gifts or grants of chattels *personal*. Under the head of gifts or grants of chattels *real*, may be included all leases for years of land, assignments, and surrenders of those leases; and all the other methods of conveying an estate less than freehold, which were considered in the twentieth chapter of the present book, and therefore need not be here again repeated: though these very seldom carry the outward appearance of a gift, however freely bestowed; being usually expressed to be made in consideration of blood, or natural affection, or of five or ten shillings nominally paid to the grantor; and in case of leases, always, reserving a rent, though it be but a pepper-corn: any of which considerations will, in the eye of the law, convert the gift if executed, into a grant; if not executed, into a contract.

GRANTS or gifts, of chattels *personal*, are the act of transferring the right and the possession of them; whereby one man renounces, and another man immediately acquires, all title and interest therein: which may be done either in writing, or by word of mouth [a], attested by sufficient evidence, of which the delivery of possession is the strongest and most essential. But this conveyance, when merely voluntary, is somewhat suspicious; and is usually construed to be fraudulent, if creditors or others become sufferers thereby. And, particularly, by statute 3 Hen. VII. c. 4. all deeds of gift of goods, made in trust to the use of the donor, shall be void: because otherwise persons might be tempted to commit treason or felony, without danger of forfeiture; and the creditors of the donor might also be defrauded of their rights. And by statute 13 Eliz. c. 5. every grant or gift of chattels, as well as lands, with an intent to defraud creditors or others [b], shall be void as against such persons to whom such fraud would be prejudicial; but, as against the grantor himself, shall stand good and effectual; and all persons partakers in, or privy to, such fraudulent grants, shall forfeit the whole value of the goods, one moiety to the king, and another moiety to the party grieved; and also on conviction shall suffer imprisonment for half a year. (1)

[a] Perk. § 57. [b] See 3 Rep. 82.

(1) The statute contains a proviso in favour of grants made "upon good consideration, and *bonâ fide*." Upon these words it was held in *Twyne's* case (3 Rep. 81.), the leading case on the subject, that no grant was protected, unless it was both on good consideration and *bonâ fide*. And it is also laid down in the same case, that the good consideration here intended is not what the words in law usually import, a consideration of natural love and affection, but a valuable consideration. On the other hand, the main object of the statute is, that the money or goods should be really applied to the payment of the party's debt, and not reserved to his own use; it does not interfere with the right which a debtor has, at common law, to prefer one creditor over another; and, therefore, a grant may be made to a creditor in trust for the general body of the grantor's creditors, although made with intent to delay some particular creditor who had gained a priority by suit; or with the same object, a man sued by one creditor, even to judgment, may voluntarily confess a judgment to another creditor; and if the last creditor obtain execution first, the preference is not void by the statute. In both cases the grantor parts with the goods actually; but if he be allowed to retain possession, and manages, and uses them as the ostensible owner, then a secret trust in his favour is implied in the grant or judgment, and they become void.

A TRUE and proper gift or grant is always accompanied with delivery of possession, and takes effect immediately: as if A gives to B 100*l.*, or a flock of sheep, and puts him in possession of them directly, it is then a gift executed in the donee; and it is not in the donor's power to retract it, though he did it without any consideration or recompense[c]: unless it be prejudicial to creditors; or the donor were under any legal incapacity, as infancy, coverture, duress, or the like; or if he were drawn in, circumvented, or imposed upon, by false pretences, ebriety, or surprise. But if the gift does not take effect, by delivery of immediate possession, it is then not properly a
[442] gift, but a contract; and this a man cannot be compelled to perform, but upon good and sufficient consideration; as we shall see under our next division.

IX. A CONTRACT, which usually conveys an interest merely in action, is thus defined: "an agreement upon sufficient consideration, to do or not to do a particular thing." From which definition there arise three points to be contemplated in all contracts; 1. The *agreement*; (2) 2. The *consideration*; and 3. The *thing* to be done or omitted, or the different species of contracts.

FIRST then it is an *agreement*, a mutual bargain or convention; and therefore there must at least be two contracting parties, of sufficient ability to make a contract; as where A contracts with B to pay him 100*l.* and thereby transfers a property in such sum to B. Which property is however not in possession, but in action merely, and recoverable by suit at

Jenk. 109.

Possession in the grantor, however, is not by itself *conclusive*, though strong evidence of fraud; a man may sell his own goods *bonâ fide*, and for a valuable consideration, and yet be allowed to retain possession of them as tenant to the grantee; in such cases, the validity of the transaction will depend, in great measure, on its notoriety. *Pickslock* v. *Lyster*, 3 M. & S. 371. See *Holbird* v. *Anderson*, 5 T. R. 235. *Jezeph* v. *Ingram*, 1 B. Moore, 189.

(2) According to the decision in *Wain* v. *Warlters*, 5 East. 10., and *Saunders* v. *Wakefield*, 4 B. & A. 595, the word agreement legally imports both promise and consideration; the author, however, evidently uses it here in the popular sense of a promise or engagement.

law; wherefore it could not be transferred to another person by the strict rules of the antient common law; for no *chose* in action could be assigned or granted over[d], because it was thought to be a great encouragement to litigiousness, if a man were allowed to make over to a stranger his right of going to law. But this nicety is now disregarded: though, in compliance with the antient principle, the form of assigning a *chose* in action is in the nature of a declaration of trust, and an agreement to permit the assignee to make use of the name of the assignor, in order to recover the possession. And therefore, when in common acceptation a debt or bond is said to be assigned over, it must still be sued in the original creditor's name; the person to whom it is transferred being rather an attorney than an assignee. But the king is an exception to this general rule, for he might always either grant or receive a *chose* in action by assignment[e]: and our courts of equity, considering that in a commercial country almost all personal property must necessarily lie in contract, will protect the assignment of a *chose* in action, as much as the law will that of a *chose* in possession[f].

[443]

THIS contract or agreement may be either express or implied. *Express* contracts are where the terms of the agreement are openly uttered and avowed at the time of the making, as to deliver an ox, or ten loads of timber, or to pay a stated price for certain goods. *Implied* are such as reason and justice dictate, and which therefore the law presumes that every man undertakes to perform. As, if I employ a person to do any business for me, or perform any work; the law implies that I undertook, or contracted, to pay him as much as his labour deserves. If I take up wares from a tradesman, without any agreement of price, the law concludes that I contracted to pay their real value. And there is also one species of implied contracts, which runs through and is annexed to all other contracts, conditions, and covenants, *viz.* that if I fail in my part of the agreement, I shall pay the other party such damages as he has sustained by such my neglect or refusal. In short, almost all the rights of personal property (when not in actual

[d] Co. Litt. 214.

[e] Dyer, 30. Bro. *Abr. tit. chose in action.* 1 & 4.

[f] 3 P. Wms. 199.

possession) do in great measure depend upon contracts, of one kind or other, or at least might be reduced under some of them: which indeed is the method taken by the civil law; it having referred the greatest part of the duties and rights, which it treats of, to the head of obligations *ex contractu* and *quasi ex contractu* [g].

A CONTRACT may also be either *executed*, as if A agrees to change horses with B, and they do it immediately; in which case the possession and the right are transferred together: or it may be *executory*, as if they agree to change next week; here the right only vests, and their reciprocal property in each other's horse is not in possession but in action; for a contract *executed* (which differs nothing from a grant) conveys a *chose in possession*; a contract *executory* conveys only a *chose in action*.

HAVING thus shewn the general nature of a contract, we are, secondly, to proceed to the *consideration* upon which it is founded; or the reason which moves the contracting party to
[444] enter into the contract. "It is an agreement, upon *sufficient* "*consideration*." The civilians hold, that in all contracts, either express or implied, there must be something given in exchange, something that is mutual or reciprocal [h]. This thing, which is the price or motive of the contract, we call the consideration; and it must be a thing lawful in itself, or else the contract is void. A *good* consideration, we have before seen [i], is that of blood or natural affection between near relations; the satisfaction accruing from which the law esteems an equivalent for whatever benefit may move from one relation to another [j]. This consideration may sometimes however be set aside, and the contract become void, when it tends in its consequences to defraud creditors, or other third persons, of their just rights. But a contract for any *valuable* consideration, as for marriage, for money, for work done, or for other reciprocal contracts, can never be impeached at law; and, if it be of a sufficient adequate value, is never set aside in equity; for the person contracted with has then given an equivalent to recom-

[g] *Inst.* 3. 14. 2.

[h] *In omnibus contractibus, sive nominatis, sive innominatis, permutatio continetur.* Gravin. *l.* 2. § 12.

[i] pag. 297.

[j] 3 Rep. 83.

pense, and is therefore as much an owner, or a creditor, as any other person.

THESE valuable considerations are divided by the civilians [k] into four species. 1. *Do, ut des:* as when I give money or goods, on a contract that I shall be repaid money or goods for them again. Of this kind are all loans of money upon bond, or promise of repayment; and all sales of goods, in which there is either an express contract to pay so much for them, or else the law implies a contract to pay so much as they are worth. 2. The second species is, *facio, ut facias;* as, when I agree with a man to do his work for him, if he will do mine for me; or if two persons agree to marry together; or to do any other positive acts on both sides. Or, it may be to forbear on one side on consideration of something done on the other; as, that in consideration A, the tenant, will repair his house, B, the landlord, will not sue him for waste. Or, it may be for mutual forbearance on both sides; as, that in consideration that A will not trade to Lisbon, B will not trade to [445] Marseilles; so as to avoid interfering with each other. 3. The third species of consideration is, *facio, ut des:* when a man agrees to perform any thing for a price, either specifically mentioned, or left to the determination of the law to set a value to it. As when a servant hires himself to his master for certain wages or an agreed sum of money: here the servant contracts to do his master's service, in order to earn that specific sum. Otherwise, if he be hired generally; for then he is under an implied contract to perform this service for what it shall be reasonably worth. 4. The fourth species is, *do, ut facias:* which is the direct counterpart of the preceding. As when I agree with a servant to give him such wages upon his performing such work: which, we see, is nothing else but the last species inverted: for *servus facit, ut herus det;* and *herus dat, ut servus faciat.*

A CONSIDERATION of some sort or other is so absolutely necessary to the forming of a contract, that a *nudum pactum,* or agreement to do or pay any thing on one side, without any compensation on the other, is totally void in law; and a man

[k] *Ff.* 19. 5. 5.

cannot be compelled to perform it[l]. As if one man promises to give another 100*l*., here there is nothing contracted for or given on the one side, and therefore there is nothing binding on the other. And, however a man may or may not be bound to perform it, in honour or conscience, which the municipal laws do not take upon them to decide; certainly those municipal laws will not compel the execution of what he had no visible inducement to engage for; and therefore our law has adopted[m] the maxim of the civil law[n], that *ex nudo pacto non oritur actio.* (3) But any degree of reciprocity will prevent the pact from being nude; nay, even if the thing be founded on a prior moral obligation (as a promise to pay a just debt, though barred by the statute of limitations), it is no longer *nudum pactum.* And as this rule was principally established, to avoid the inconvenience that would arise from setting up mere verbal promises, for which no good reason could
[446] be assigned[o] it therefore does not hold in some cases, where such promise is authentically proved by written documents. For if a man enter into a voluntary bond, or gives a promissory note, he shall not be allowed to aver the want of a consideration in order to evade the payment: for every bond from the solemnity of the instrument[p], and every note from the subscription of the drawer[q] carries with it an internal evidence of a good consideration. Courts of justice will therefore support them both, as against the contractor himself; but not to the prejudice of creditors, or strangers to the contract. (4)

[l] Dr. & St. d. 2. c. 24.
[m] Bro. *Abr. tit. dette.* 79. Salk. 129.
[n] *Cod.* 2, 3. 10. & 5. 14. 1.
[o] Plowd. 308, 309.
[p] Hardr. 200. 1 Ch. R. 157.
[q] Ld. Raym. 760.

(3) Though the position is true for which these authorities are cited, yet upon reference to the originals, it will be seen, that much weight cannot be attached to either of them.

(4) The doctrine of consideration is not, perhaps, so fully or so correctly stated in this paragraph as might have been expected. 1. From the various decisions on the subject, it should seem that there is a distinction in certain cases, as to the necessary consideration between an implied and an express promise. An implied promise is that which the *law* raises from previous circumstances passing between the parties, and therefore the foundation must be something, which has *legal* value. With this restriction it

We are next to consider, *thirdly*, the thing agreed to be done or omitted. "A contract is an agreement, upon sufficient consideration, *to do or not to do a particular thing*." The most usual contracts, whereby the right of chattels personal may be acquired in the laws of England, are, 1. That of *sale* or *exchange*. 2. That of *bailment*. 3. That of *hiring* and *borrowing*. 4. That of *debt*.

1. Sale, or *exchange*, is a transmutation of property from one man to another, in consideration of some price or recompence in value; for there is no sale without a recompence: there must be *quid pro quo*[r] If it be a commutation of goods for goods, it is more properly an *exchange*: but if it be a transferring of goods for money, it is called a *sale*; which is a method of exchange introduced for the convenience of

[r] Noy's Max. c. 42.

---

it may be laid down that any act done by the one party with the consent of the other, by which the one loses or suffers, or the other gains, in however small a degree, is a sufficient consideration for a promise, which the law will imply, of a commensurate recompense. Principles of law, however, or the provisions of statutes, prevent that implication from being made in certain cases, although the loss has been sustained by the one, or the benefit received by the other; the instance put in the text of a just debt barred by the statute of limitations is a case in point. In such cases, though the legal liability is gone, the moral duty and the original legal consideration remain; if then the party expressly promise to pay the debt, he waives the protection of the statute, resumes his legal liability, and suffers the former consideration to operate. This, therefore, is hardly an exception in principle to the rule that every promise must have a sufficient consideration.

Nor 2dly, Do written promises fall under any different principle. If, indeed, a promise be under seal, the solemnity of that mode of delivery is said to import at law that there was a sufficient consideration for the promise, and the plaintiff is not put to prove such consideration. But neither this case, nor that of the promissory note, stand on the authentication given them by writing; a merely written promise is precisely on the same footing as a verbal one at common law, and though in some cases writing is by statute made essential to the validity of a promise, yet in these, the writing is only a condition superadded, the promise must still have all the common law requisites of a verbal promise. See *Wennall* v. *Adney*, 3 B. & P. 249. n.(a). *Rann* v. *Hughes*, 7 T. R. n. a. 350. *Wain* v. *Warlters*, 5 East. 10.

mankind, by establishing an universal medium, which may be exchanged for all sorts of other property; whereas if goods were only to be exchanged for goods, by way of barter, it would be difficult to adjust the respective values, and the carriage would be intolerably cumbersome. All civilized nations adopted, therefore, very early the use of money; for we find Abraham giving "four hundred shekels of silver, "current money with the merchant," for the field of Macpelah [s]; though the practice of exchange still subsists among several of the savage nations. But with regard to the *law* of
[447] sales and exchanges, there is no difference. I shall therefore treat of them both under the denomination of sales only; and shall consider their force and effect, in the first place where the vendor *hath* in himself, and secondly where he *hath not* the property of the thing sold.

Where the vendor *hath* in himself the property of the goods sold, he hath the liberty of disposing of them to whomever he pleases, at any time, and in any manner; unless judgment has been obtained against him for a debt or damages, and the writ of execution is actually delivered to the sheriff. For then, by the statute of frauds [t], the sale shall be looked upon as fraudulent, and the property of the goods shall be bound to answer the debt, from the time of delivering the writ. Formerly it was bound from the *teste*, or issuing of the writ [v], and any subsequent sale was fraudulent; but the law was thus altered in favour of *purchasers*, though it still remains the same between the parties; and therefore if a defendant dies after the awarding and before the delivery of the writ, his goods are bound by it in the hands of his executors [u].

If a man agrees with another for goods at a certain price, he may not carry them away before he hath paid for them; for it is no sale without payment, unless the contrary be expressly agreed. And therefore if the vendor says, the price of a beast is four pounds, and the vendee says he will give four pounds, the bargain is struck; and they neither of them

[s] Gen. c. 23. v. 16.
[t] 29 Car. II. c. 3.
[v] 8 Rep. 171 1 Mod. 188.
[u] Comb. 33. 12 Mod. 5. 7 Mod. 95

are at liberty to be off, provided immediate possession be tendered by the other side. But if neither the money be paid, nor the goods delivered, nor tender made, nor any subsequent agreement be entered into, it is no contract, and the owner may dispose of the goods as he pleases [u]. But if any part of the price is paid down, if it be but a penny, or any portion of the goods delivered by way of *earnest* (which the civil law calls *arrha*, and interprets to be "*emptionis venditionis* "*contractae argumentum* [w]") the property of the goods is [448 absolutely bound by it; and the vendee may recover the goods by action, as well as the vendor may the price of them [x]. And such regard does the law pay to earnest as an evidence of a contract, that by the same statute, 29 Car. II. c. 3., no contract for the sale of goods, to the value of 10*l.* or more, shall be valid, unless the buyer actually receives part of the goods sold, by way of earnest on his part; or unless he gives part of the price to the vendor by way of earnest to bind the bargain, or in part of payment; or unless some note in writing be made and signed by the party or his agent; who is to be charged with the contract. (5) And with regard to goods

[u] Hob. 41. Noy's Max. c. 42. [x] Noy, *ibid.*
[w] *Inst.* 3. *tit.* 24. 1.

(5) As the statute of frauds does not render the contract in cases to which it applies, void or illegal, but only takes away the legal remedy to enforce performance, where the whole remains executory, and there has been no partial performance, the great struggle has always been to determine, what *is* a part performance, what is a delivery, an acceptance, or a part payment. Upon these points the tenor of modern decisions is to give the words of the statute their fullest effect, and not to allow (so far as is possible) of any constructive deliveries or acceptances. In some cases, where the goods are in the hands of third persons at the time of the sale, or form a confused part of a large mass, or are too cumbersome for immediate actual removal; from the necessity of the thing the exercise of some clear act of ownership has been admitted to be, constructively, such a delivery and acceptance as will satisfy the statute. But in cases where this necessity does not exist, actual acceptance is required, and while any thing remains to be done on either side, as if the goods are to be weighed, or the price to be paid, the courts will not hold the contract to have been performed. A strong case on this subject is that of *Tempest* v. *Fitzgerald*, 3 B. & A. 680. The defendant in August agreed to buy a horse of the plaintiff for forty-five guineas, and fetch it away in September as he went to the Doncaster races — it was to be a ready money bargain. In September he

under the value of 10*l.* no contract or agreement for the sale of them shall be valid, unless the goods are to be delivered within one year, or unless the contract be made in writing, and signed by the party, or his agent, who is to be charged therewith. Antiently, among all the northern nations, shaking of hands was held necessary to bind the bargain; a custom which we still retain in many verbal contracts. A sale thus made was called *handsale*, "*venditio per mutuam manuum complexionem*[y];" till in process of time the same word was used to signify the price or earnest, which was given immediately after the shaking of hands, or instead thereof.

As soon as the bargain is struck, the property of the goods is transferred to the vendee, and that of the price to the vendor; but the vendee cannot take the goods, until he tenders the price agreed on[z]. But if he tenders the money to the vendor, and he refuses it, the vendee may seize the goods, or have an action against the vendor for detaining them. And by a regular sale, without delivery, the property is so absolutely vested in the vendee, that if A sells a horse to B for 10*l.* and B pays him earnest, or signs a note in writing of the bargain; and afterwards, before the delivery of the horse, or money paid, the horse dies in the vendor's custody, [449] still he is entitled to the money, because, by the contract, the property was in the vendee[a]. Thus may property in goods

[y] Stiernhook *de jure Goth. l. 2. c. 5.*
[z] Hob. 41.
[a] Noy, c. 42.

---

he came, and he, as well as his servant rode the horse, and leaped him, his servant cleaned him, and he gave some directions as to his standing with a different roller on, and a strap about his neck, which were obeyed. He asked the plaintiff's son to keep him another week, who said he would to oblige him; he said he would return in a week for the horse and pay for him and told the plaintiff's groom he ought to be galloped more, as he was not in a condition for hunting, for which he was bought. He returned in a few days for the horse, which had died in the interval. Here it would have seemed, that the defendant had done every thing which could amount to a constructive acceptance; but he had no right to the horse till the price was paid. The very object of the statute was to put contracts on an unequivocal footing, and the court held that the horse was still the property of the plaintiff, and that the contract could not be enforced.

be transferred by sale, where the vendor *hath* such property in himself. (6)

But property may also in some cases be transferred by sale, though the vendor *hath none at all* in the goods; for it is expedient that the buyer, by taking proper precautions, may at all events be secure of his purchase; otherwise all commerce between man and man must soon be at an end. And therefore the general rule of law is [b], that all sales and contracts of any thing vendible, in fairs or markets *overt*, (that is, open,)

[b] 2 Inst. 713.

---

(6) This seems the proper place for noticing a very important head of the law, of which, I believe, the author makes no mention, I mean what is called the right of stoppage *in transitu*. Where the parties to a contract deal on credit, it is obvious that the vendee's interest in the goods, or his right to possession do not depend on the previous payment or tender of the price; in such case, two contracts, in fact, subsist independent of each other, a contract to deliver at one time, and a contract to pay at another. In this case, it may often happen that the vendor may discover before he has completed his contract, that the vendee will never be in a condition to complete *his*; in other words, that if the goods are delivered, they will never be paid for. The hardship of compelling him in such circumstances to deliver them has given rise to what is called stoppage *in transitu*, which is the right of the vendor, who has not received the full price, to stop the goods at any time in their transit, and before the delivery is complete, in case of the insolvency of the vendee. Partial payment will not destroy this right, because the effect of the stoppage is not to rescind the contract, which after part-payment cannot be done, but is the exercise of a lien on the goods, a retainer of them till the full price is paid. This doctrine first prevailed in the courts of equity, and is acted upon in courts of law on principles of equitable justice; the right to stop continues in every stage of the transit, not merely while the goods are in the hands of the vendor's exclusive agent, but while they are in those of a middle-man between the two parties; nor can the vendee determine it by anticipating the natural termination — if the goods be coming by sea to a particular port, he cannot meet them midway, and take possession; if they reach the port, but are put under quarantine, he cannot take them till that is determined; neither can the vendee confer a right which he has not in himself; his creditor or his vendee can claim only subject to the original vendor's right. In order to give effect to the right, it is sufficient for the vendor to give notice and put in his claim, to the parties who have the possession of the goods; after that, a delivery to the vendee, either by mistake, or perversely, vests no right, and the vendor may maintain an action for the goods. See the cases collected, Selw. N. P. 1234, &c. 6th edition.

shall not only be good between the parties, but also be binding on all those that have any right or property therein. And for this purpose, the mirror informs us [c], were tolls established in markets, *viz.* to testify the making of contracts; for every private contract was discountenanced by law: insomuch that our Saxon ancestors prohibited the sale of any thing above the value of twenty pence, unless in open market, and directed every bargain and sale to be contracted in the presence of credible witnesses [d]. Market overt in the country is only held on the special days, provided for particular towns by charter or prescription; but in London every day, except Sunday, is market day [e]. The market place, or spot of ground set apart by custom for the sale of particular goods, is also in the country the only market overt [f]: but in London every shop in which goods are exposed publicly to sale, is market overt, for such things only as the owner professes to trade in [g]. But if my goods are stolen from me, and sold out of market overt, my property is not altered, and I may take them wherever I find them. And it is expressly provided by statute, 1 Jac. I. c. 21., that the sale of any goods wrongfully taken, to any pawnbroker in London, or within two miles thereof, shall not alter the property: for this, being usually a clandestine trade, is therefore made an exception to the general rule (7). And even in market overt, if the goods be the property of the king, such sale (though regular in all other respects) will in no case bind him: though it binds infants,
[450] feme coverts, idiots, or lunatics, and men beyond sea or in prison: or if the goods be stolen from a common person, and then taken by the king's officer from the felon, and sold in open market; still, if the owner has used due diligence in prosecuting the thief to conviction, he loses not his property in the goods [h]. So likewise, if the buyer knoweth the property not to be in the seller; or there be any other fraud in the transaction; if he knoweth the seller to be an infant, or feme covert not usually trading for herself; if the sale be not

[c] *c.* 1. § 3.
[d] *LL. Æthel.* 10. 12. *LL. Eadg.* Wilk. 80.
[e] Cro. Jac. 68.
[f] Godb. 131.
[g] 5 Rep. 83. 12 Mod. 521.
[h] Bacon's use of the law, 158.

(7) See post, 452. n.

originally and wholly made in the fair or market, or not at the usual hours; the owner's property is not bound thereby [l]. If a man buys his own goods in a fair or market, the contract of sale shall not bind him, so that he shall render the price: unless the property had been previously altered by a former sale [k]. And notwithstanding any number of intervening sales, if the original vendor, who sold without having the property, comes again into possession of the goods, the original owner may take them, when found in his hands who was guilty of the first breach of justice [l]. By which wise regulations the common law has secured the right of the proprietor in personal chattels from being devested, so far as was consistent with that other necessary policy, that purchasers, *bona fide*, in a fair, open, and regular manner, should not be afterwards put to difficulties by reason of the previous knavery of the seller.

But there is one species of personal chattels, in which the property is not easily altered by sale, without the express consent of the owner, and those are horses [m]. For a purchaser gains no property in a horse that has been stolen, unless it be bought in a fair or market overt, according to the directions of the statutes 2 P. & M. c. 7. and 31 Eliz. c. 12. By which it is enacted, that the horse shall be openly exposed, in the time of such fair or market, for one whole hour together, between ten in the morning and sun-set, in the public place used for such sales, and not in any private yard or stable; and afterwards brought by both the vendor and vendee to the book-keeper of such fair or market; that toll be paid, if any be due; and if not, one penny to the book-keeper, [451] who shall enter down the price, colour, and marks of the horse, with the names, additions, and abode of the vendee and vendor; the latter being properly attested. Nor shall such sale take away the property of the owner, if within six months after the horse is stolen he puts in his claim before some magistrate, where the horse shall be found; and, within forty days more, proves such his property by the oath of two

[l] 2 Inst. 713, 714. (8)
[k] Perk. § 93.
[l] 2 Inst. 713.
[m] 2 Inst. 719.

(8) See the case of *Freeman* v. *East India Company*, 5 B. & A. 624.

witnesses, and tenders to the person in possession such price as he *bonâ fide* paid for him in market overt. But in case any one of the points before mentioned be not observed, such sale is utterly void; and the owner shall not lose his property, but at any distance of time may seize or bring an action for his horse, wherever he happens to find him.

By the civil law [n] an implied warranty was annexed to every sale, in respect to the title of the vendor; and so too, in our law, a purchaser of goods and chattels may have a satisfaction from the seller, if he sells them as his own and the title proves deficient, without any express warranty for that purpose [o]. But with regard to the goodness of the wares so purchased, the vendor is not bound to answer: unless he expressly warrants them to be sound and good [p], or unless he knew them to be otherwise and hath used any art to disguise them [q], or unless they turn out to be different from what he represented them to the buyer. (9)

2. Bailment, from the French *bailler*, to deliver, is a delivery of goods in trust, upon a contract expressed or implied, that the trust shall be faithfully executed on the part of the bailee. As if cloth be delivered, or (in our legal dialect) bailed, to a tailor to make a suit of cloaths, he has it upon an implied contract to render it again when made, and that in a workmanly manner [r]. If money or goods be delivered to a common carrier, to convey from Oxford to London, he is under a contract in law to pay, or carry them, to the person appointed [s]. If a horse, or other goods, be delivered to an innkeeper or his servants, he is bound to keep
[452] them safely, and restore them when his guest leaves the house [t]. (10) If a man takes in a horse, or other cattle, to graze and depasture in his grounds, which the law calls *agistment*, he takes them upon an implied contract to return

[n] *Ff.* 21. 2. 1.
[o] Cro. Jac. 474. 1 Roll. Abr. 90.
[p] F. N. B. 94. 2 Roll. Rep. 5.
[r] 1 Vern. 268.
[s] 12 Mod. 482.
[t] Cro. Eliz. 622.

(9) See Vol. III. p. 166. n. (21).
(10) See Vol. III. p. 165, 166. n. (18), (19).

them on demand to the owner [u]. If a pawnbroker receives plate or jewels as a pledge, or security, for the repayment of money lent thereon at a day certain, he has them upon an express contract or condition to restore them, if the pledgor performs his part by redeeming them in due time [w]: for the due execution of which contract many useful regulations are made by statute 30 Geo. II. c. 24. (11) And so if a landlord distrains goods for rent, or a parish officer for taxes, these for a time are only a pledge in the hands of the distrainors, and they are bound by an implied contract in law to restore them on payment of the debt, duty, and expences, before the time of sale; or, when sold, to render back the overplus. If a friend delivers any thing to his friend to keep for him, the receiver is bound to restore it on demand; and it was formerly held that in the mean time he was answerable for any damage or loss it might sustain, whether by accident or otherwise [x]; unless he expressly undertook [y] to keep it only with the same care as his own goods, and then he should not be answerable for theft or other accidents. But now the law seems to be settled [z] that such a general bailment will not charge the bailee with any loss, unless it happens by gross

[u] Cro. Car. 271.
[w] Cro. Jac. 245. Yelv. 178.
[x] Co. Litt. 89.
[y] 4 Rep. 84.
[z] Lord Raym. 909. 12 Mod. 487.

(11) The 39 & 40 G. 3. c. 99. is now the regulating statute on this subject. It limits the interest which pawnbrokers may take, in protection of the distressed pawnors; and it attempts, by several provisions, to guard against the facility, which pawnbroking affords to the dishonest for the putting away of stolen goods. At the expiration of a year and a day, unredeemed pledges are to be considered forfeited, and may be sold by public auction only, unless the pawnor shall give notice to the broker not to sell them, in which case the sale must be postponed for three calendar months: but in no case does this forfeiture devest the property out of the pawnor, unless the broker sells under the power of the statute; and the pawnee has a right at any time, before a sale has taken place, to redeem the goods, *Waller* v. *Smith*, 5 B. & A. 459., and even where sold, if the goods have been pawned for more than ten shillings, and they sell for more than the principal and interest due on them, and the costs of the sale, the owner is entitled to such overplus upon demand made within three years after the sale; the object of the sale being merely to reimburse the broker his principal, interest, and expences.

neglect, which is an evidence of fraud: but, if he undertakes specially to keep the goods safely and securely, he is bound to take the same care of them, as a prudent man would take of his own [a]. (12)

In all these instances there is a special qualified property transferred from the bailor to the bailee, together with the possession. It is not an absolute property, because of his con-
[453] tract for restitution; the bailor having still left in him the right to a *chose* in action, grounded upon such contract. And, on account of this qualified property of the bailee, he may (as well as the bailor) maintain an action against such as injure or take away these chattels. The tailor, the carrier, the innkeeper, the agisting farmer, the pawnbroker, the distreinor, and the general bailee, may all of them vindicate, in their own right, this their possessory interest, against any stranger or third person [b]. For, being responsible to the bailor, if the goods are lost or damaged by his wilful default or gross negligence, or if he do not deliver up the chattels on lawful demand, it is therefore reasonable that he should have a right of action against all other persons who may have purloined or injured them; that he may always be ready to answer the call of the bailor.

3. Hiring and *borrowing* are also contracts by which a qualified property may be transferred to the hirer or borrower: in which there is only this difference, that hiring is

[a] By the laws of Sweden the depositary or bailee of goods is not bound to restitution, in case of accident by fire or theft: provided his own goods perished in the same manner; "*jura enim nostra*," says Stiernhook, "*dolum præsumunt, si una non pereant.*" (*De jure Sueon. l. 2. c. 5.*) [b] 13 Rep. 69.

(12) It must be understood, that this special undertaking be founded on a sufficient consideration, for the mere promise to keep safely will not impose a new obligation in law. The student will find the best abstract of the law on the responsibility of bailees in Lord Holt's celebrated judgment in the case of *Coggs* v. *Bernard*, 2 Ld. Raym. 912. The principle upon which the responsibility increases, from requiring less than even ordinary care, up to the greatest possible degree of it, and beyond that even to the liability for the violent and wrongful acts of others, is mainly regulated by the less or greater degree of convenience or gain derived by the bailee from the bailment.

always for a price, a stipend, or additional recompense; borrowing is merely gratuitous. But the law in both cases is the same. They are both contracts, whereby the possession and a transient property is transferred for a particular time or use, on condition to restore the goods so hired or borrowed, as soon as the time is expired or use performed; together with the price or stipend (in case of hiring) either expressly agreed on by the parties, or left to be implied by law according to the value of the service. By this mutual contract, the hirer or borrower gains a temporary property in the thing hired, accompanied with an implied condition to use it with moderation, and not abuse it; and the owner or lender retains a reversionary interest in the same, and acquires a new property in the price or reward. Thus if a man hires or borrows a horse for a month, he has the possession and a qualified property therein during that period: on the expiration of which his qualified property determines, and the owner becomes (in case of hiring) entitled also to the price for which the horse was hired [c].

[454] THERE is one species of this price or reward, the most usual of any, but concerning which many good and learned men have in former times very much perplexed themselves and other people, by raising doubts about its legality *in foro conscientiae*. That is, when money is lent on a contract to receive not only the principal sum again, but also an increase by way of compensation for the use; which generally is called *interest* by those who think it lawful, and *usury* by those who do not so. For the enemies to interest in general make no distinction between that and usury, holding any increase of money to be indefensibly usurious. And this they ground as well on the prohibition of it by the law of Moses among the Jews, as also upon what is said to be laid down by Aristotle [d], that money is naturally barren, and to make it breed money is preposterous, and a perversion of the end of it's institution, which was only to serve the purposes of exchange and not of increase. Hence the school divines have branded the practice of taking interest, as being contrary to the di-

[c] Yelv. 172. Cro. Jac. 236.

[d] *Polit. l.* 1. *c.* 10. This passage hath been suspected to be spurious.

vine law both natural and revealed; and the canon law [e] has proscribed the taking any, the least, increase for the loan of money as a mortal sin.

But, in answer to this, it hath been observed, that the Mosaical precept was clearly a political, and not a moral precept. It only prohibited the Jews from taking usury from their brethren the Jews; but in express words permitted them to take it of a stranger [f]: which proves that the taking of moderate usury, or a reward for the use, for so the word signifies, is not *malum in se*; since it was allowed where any but an Israelite was concerned. And as to the reason supposed to be given by Aristotle, and deduced from the natural barrenness of money, the same may with equal force be alleged of houses, which never breed houses; and twenty other things, which nobody doubts it is lawful to make profit of, by letting them to hire. And though money was originally used only for the purposes of exchange, yet the laws of any state
[455] may be well justified in permitting it to be turned to the purposes of profit, if the convenience of society (the great end for which money was invented) shall require it. And that the allowance of moderate interest tends greatly to the benefit of the public, especially in a trading country, will appear from that generally acknowledged principle, that commerce cannot subsist without mutual and extensive credit. Unless money therefore can be borrowed, trade cannot be carried on; and if no premium were allowed for the hire of money, few persons would care to lend it; or at least the ease of borrowing at a short warning (which is the life of commerce) would be entirely at an end. Thus, in the dark ages of monkish superstition and civil tyranny, when interest was laid under a total interdict, commerce was also at it's lowest ebb, and fell entirely into the hands of the Jews and Lombards: but when men's minds began to be more enlarged, when true religion and real liberty revived, commerce grew again into credit: and again introduced with itself it's inseparable companion, the doctrine of loans upon interest. And, as to any scruples of conscience, since all other conveniences of life may either be bought or hired, but money can only be hired, there seems

[e] *Decretal. l. 5. tit. 19.* [f] Deut. xxiii. 20.

to be no greater oppression in taking a recompense or price for the hire of this, than of any other convenience. To demand an exorbitant price is equally contrary to conscience, for the loan of a horse, or the loan of a sum of money: but a reasonable equivalent for the temporary inconvenience, which the owner may feel by the want of it, and for the hazard of his losing it entirely, is not more immoral in one case than it is in the other. Indeed the absolute prohibition of lending upon any, even, moderate interest, introduces the very inconvenience which it seems meant to remedy. The necessity of individuals will make borrowing unavoidable. Without some profit allowed by law, there will be but few lenders; and those principally bad men, who will break through the law, and take a profit; and then will endeavour to indemnify themselves from the danger of the penalty, by making that profit exorbitant. A capital distinction must therefore be made between a moderate and exor- [456]
bitant profit; to the former of which we usually give the name of interest, to the latter the truly odious appellation of usury: the former is necessary in every civil state, if it were but to exclude the latter, which ought never to be tolerated in any well-regulated society. For, as the whole of this matter is well summed up by Grotius [5], "if the compensation allowed by law "does not exceed the proportion of the hazard run, or the "want felt, by the loan, it's allowance is neither repugnant "to the revealed nor the natural law: but if it exceeds those "bounds, it is then oppressive usury; and though the municipal laws may give it impunity, they can never make it just."

We see that the exorbitance or moderation of interest, for money lent, depends upon two circumstances; the inconvenience of parting with it for the present, and the hazard of losing it entirely. The inconvenience to individual lenders can never be estimated by laws; the rate therefore of general interest must depend upon the usual or general inconvenience. This results entirely from the quantity of specie or current money in the kingdom; for the more specie there is circulating in any nation, the greater superfluity there will be, beyond what is necessary to carry on the business of exchange

and the common concerns of life. In every nation or public community, there is a certain quantity of money thus necessary; which a person well skilled in political arithmetic might perhaps calculate as exactly, as a private banker can the demand for running cash in his own shop: all above this necessary quantity may be spared, or lent, without much inconvenience to the respective lenders; and the greater this national superfluity is, the more numerous will be the lenders, and the lower ought the rate of the national interest to be; but where there is not enough circulating cash, or barely enough, to answer the ordinary uses of the public, interest will be proportionably high: for lenders will be but few, as few can submit to the inconvenience of lending.

[457] So also the hazard of an entire loss has it's weight in the regulation of interest: hence the better the security, the lower will the interest be; the rate of interest being generally in a compound *ratio*, formed out of the inconvenience, and the hazard. And as, if there were no inconvenience, there should be no interest but what is equivalent to the hazard, so, if there were no hazard, there ought to be no interest, save only what arises from the mere inconvenience of lending. Thus, if the quantity of specie in a nation be such, that the general inconvenience of lending for a year is computed to amount to *three per cent.*, a man that has money by him will perhaps lend it upon good personal security at *five per cent.*, allowing two for the hazard run; he will lend it upon landed security or mortgage at *four per cent.*, the hazard being proportionably less; but he will lend it to the state, on the maintenance of which all his property depends, at *three per cent.*, the hazard being none at all. (13)

---

(13) This proportion between the inconvenience, and the two descriptions of hazard, is entirely arbitrary, and only put for an example.

In this disquisition upon the principles which regulate the rate of interest, and on all subjects connected with political economy, the author writes with the information only of his age; his reasoning is open to much observation, but as the subject is only collateral, and could not be explained satisfactorily except at considerable length, I think it better to content myself with this notice.

But sometimes the hazard may be greater, than the rate of interest allowed by law will compensate. And this gives rise to the practice of, 1. Bottomry, or *respondentia*. 2. Policies of insurance. 3. Annuities upon lives.

And first, *bottomry* (which originally arose from permitting the master of a ship, in a foreign country, to hypothecate the ship in order to raise money to refit) (14) is in the nature of a mortgage of a ship; when the owner takes up money to enable him to carry on his voyage, and pledges the keel or *bottom* of the ship (*partem pro toto*) as a security for the repayment. In which case it is understood, that if the ship be lost, the lender loses also his whole money; but, if it returns in safety, then he shall receive back his principal, and also the premium or interest agreed upon, however it may exceed the legal rate of interest. And this is allowed to be a valid contract in all trading nations, for the benefit of commerce, and by reason of the extraordinary hazard run by the lender[h]. And in this case the ship and tackle, if brought home, are [458] answerable (as well as the person of the borrower) for the money lent. But if the loan is not upon the vessel, but upon the goods and merchandize, which must necessarily be sold or exchanged in the course of the voyage, then only the borrower, personally, is bound to answer the contract; who therefore in this case is said to take up money at *respondentia*. These terms are also applied to contracts for the repayment of money borrowed, not on the ship and goods only, but on the mere hazard of the voyage itself; when a man lends a merchant 1000*l.* to be employed in a beneficial trade, with

h Moll. *de jur. mar.* 361. Malyne, c. 42. Cro. Jac. 208, Bynkersh. *quaest. lex mercat.* b. 1. c. 31. Bacon's essays, *jur. privat. l.* 3. *c.* 16.

(14) "This opinion may well be doubted, for although the practice of lending money upon maritime risks at a high premium was well known to the Romans before the time of Justinian, yet in those titles of the Digest and the Code, which expressly treat of this subject, no mention is made of contracts of this nature entered into by the master of a ship in that character, according to the practice which has since universally prevailed. And except for the purpose of securing the payment of maritime interest, actual hypothecation was not necessary to give the creditor a claim upon the ship." Abbott on Shipping, 143. 4th edition.

condition to be repaid with extraordinary interest, in case such a voyage be safely performed [i]: which kind of agreement is sometimes called *foenus nauticum*, and sometimes *usura maritima* [j]. But as this gave an opening for usurious and gaming contracts, especially upon long voyages, it was enacted by the statute 19 Geo. II. c. 37. that all monies lent on bottomry or at *respondentia*, on vessels [belonging to his Majesty's subjects] bound to or from the East Indies, (15) shall be expressly lent only upon the ship or upon the merchandize; that the lender shall have the benefit of salvage [k]; and that if the borrower hath not an interest in the ship, or in the effects on board, equal to the value of the sum borrowed, he shall be responsible to the lender for so much of the principal as hath not been laid out, with legal interest and all other charges, though the ship and merchandize be totally lost.

Secondly, a policy of *insurance* is a contract between A and B, that upon A's paying a premium equivalent to the hazard run, B will indemnify or insure him against a particular event. This is founded upon one of the same principles as the doctrine of interest upon loans, that of hazard; but not that of inconvenience. For if I insure a ship to the Levant, and back again, at *five per cent.*; here I calculate the chance that she performs her voyage to be twenty to one against her being lost: and, if she be lost, I lose 100*l.* and get 5*l.* Now this is much the same as if I lend the merchant whose whole fortunes are embarked in this vessel, 100*l.* at
[459] the rate of *eight per cent.* For by a loan I should be immediately out of possession of my money, the inconvenience of which we have supposed equal to *three per cent.*: if therefore I had actually lent him 100*l.*, I must have added 3*l.* on the score of inconvenience, to the 5*l.* allowed for the hazard, which together would have made 8*l.* But, as upon an insur-

[i] 1 Sid. 27.
[j] Molloy, *ibid.* Malyne, *ibid.*
[k] See Vol. I. page 294.

(15) And a previous statute, 7 G. 1. c. 21. makes null and void all contracts by his majesty's subjects, or any one in trust for them, upon the loan of any money by way of bottomry on any ship in the service of foreigners bound to the East Indies.

ance, I am never out of possession of my money till the loss actually happens, nothing is therein allowed upon the principle of inconvenience, but all upon the principle of hazard. Thus, too, in a loan, if the chance of repayment depends upon the borrower's life, it is frequent (besides the usual rate of interest) for the borrower to have his life insured till the time of repayment; for which he is loaded with an additional premium, suited to his age and constitution. Thus, if Sempronius has only an annuity for his life, and would borrow 100*l.* of Titius for a year; the inconvenience and general hazard of this loan, we have seen, are equivalent to 5*l.*, which is therefore the legal interest; but there is also a special hazard in this case; for, if Sempronius dies within the year, Titius must lose the whole of his 100*l.* Suppose this chance to be as one to ten: it will follow that the extraordinary hazard is worth 10*l.* more, and therefore that the reasonable rate of interest in this case would be *fifteen per cent.*. But this the law, to avoid abuses, will not permit to be taken; Sempronius therefore gives Titius the lender only 5*l.* the legal interest; but applies to Gaius an insurer, and gives him the other 10*l.* to indemnify Titius against the extraordinary hazard. And in this manner may any extraordinary or particular hazard be provided against, which the established rate of interest will not reach; that being calculated by the state to answer only the ordinary and general hazard, together with the lender's inconvenience in parting with his specie for the time. But, in order to prevent these insurances from being turned into a mischievous kind of gaming, it is enacted by statute 14 Geo. III. c. 48., that no insurance shall be made on lives, or on any other event, wherein the party insured hath no interest; that in all policies the name of such interested party shall be inserted; and nothing more shall be recovered thereon than the amount of the interest of the insured. [460]

This doth not, however, extend to marine insurances, which were provided for by a prior law of their own. The learning relating to these insurances hath of late years been greatly improved by a series of judicial decisions; which have now established the law in such a variety of cases, that (if well and judiciously collected) they would form a very complete title in a code of commercial jurisprudence: but, being

founded on equitable principles, which chiefly result from the special circumstances of the case, it is not easy to reduce them to any general heads in mere elementary institutes. (16) Thus much however may be said; that being contracts, the very essence of which consists in observing the purest good faith and integrity, they are vacated by any the least shadow of fraud or undue concealment; and on the other hand, being much for the benefit and extension of trade, by distributing the loss or gain among a number of adventurers, they are greatly encouraged and protected both by common law and acts of parliament. But as a practice had obtained of insuring large sums without having any property on board, which were called insurances, *interest or no interest*, and also of insuring the same goods several times over; both of which were a species of gaming without any advantage to commerce, and were denominated *wagering* policies: it is therefore enacted by the stat. 19 Geo. II. c. 37., that all insurances, interest, or no interest, or without farther proof of interest than the policy itself, or by way of gaming or wagering, or without benefit of salvage to the insurer (all of which had the same pernicious tendency), shall be totally null and void, except upon privateers, or upon ships or merchandize from the Spanish and Portuguese dominions, for reasons sufficiently obvious; and that no re-assurance shall be lawful, except the former insurer shall be insolvent, a bankrupt, or dead: and lastly, that, in the East India trade, the lender of money on bottomry, or at *respondentia*, shall alone have a
[461] right to be insured for the money lent, and the borrower shall (in case of a loss) recover no more upon any insurance than the surplus of his property, above the value of his bottomry, or *respondentia* bond. (17)

---

(16) This has been done by Mr. Justice Park in his system of the law of marine insurances, and the student will find an excellent compendium of the law on the subject, in the notes to the case of *Goram* v. *Sweeting*, 2 Saund. 200. ed. 1824.

(17) The object of all insurance is *indemnity*; and upon this principle, all contracts of insurance are construed. Thus, a creditor has an interest in the life of his debtor to the amount of his debt, and he may insure against the loss of that debt; but if, on the death of the debtor, his executors

THIRDLY, the practice of purchasing *annuities for lives* at a certain price or premium, instead of advancing the same sum on an ordinary loan, arises usually from the inability of the borrower to give the lender a permanent security for the return of the money borrowed, at any one period of time. He therefore stipulates (in effect) to repay annually, during his life, some part of the money borrowed; together with legal interest for so much of the principal as annually remains unpaid, and an additional compensation for the extraordinary hazard run, of losing that principal entirely by the contingency of the borrower's death: all which considerations, being calculated and blended together, will constitute the just proportion or *quantum* of the annuity which ought to be granted. The real value of that contingency must depend on the age, constitution, situation, and conduct of the borrower; and therefore the price of such annuities cannot, without the utmost difficulty, be reduced to any general rules. So that if, by the terms of the contract, the lender's principal is *bonâ fide* (and not colourably [1]) put in jeopardy, no inequality of price will make it an usurious bargain; though, under some circumstances of imposition, it may be relieved against in equity. To throw however some check upon improvident transactions of this kind, which are usually carried on with great privacy, the statute 17 Geo. III. c. 26. has directed, that upon the sale of any life annuity of more than the value of ten pounds *per annum* (unless on a sufficient pledge of lands in fee-simple or stock in the public funds) the true consideration, which shall be in money only, shall be set forth and described in the security itself; and a memorial of the date of the security, of the names of the parties, *cestuy que trusts*, *cestuy que vies*, and witnesses, and of the consideration money, shall within twenty days after it's execution be enrolled in the court of chancery; else the security shall be null and void: and, in case of collusive practices respecting the

[1] Carth. 67.

---

tors discharge the debt, he can recover nothing from the insurer. *Godsall* v. *Boldero*, 9 East. 72.

consideration, the court, in which any action is brought or judgment obtained upon such collusive security, may order the same to be cancelled, and the judgment (if any) to be vacated: and also all contracts for the purchase of annuities from infants shall remain utterly void, and be incapable of confirmation after such infants arrive to the age of maturity. But to return to the doctrine of common interest on loans: (18)

Upon the two principles of inconvenience and hazard, compared together, different nations have, at different times, established different rates of interest. The Romans at one time allowed *centesimae*, *one per cent.* monthly, or *twelve per cent. per annum*, to be taken for common loans; but Justinian [m] reduced it to *trientes*, or one third of the *as* or *cente-*

[m] *Cod.* 4. 32. 26. *Nov.* 33, 34, 35. —— A short explication of these terms, and of the division of the Roman *as*, will be useful to the student, not only for understanding the civilians, but also the more classical writers, who perpetually refer to this distribution. Thus Horace, *ad Pisones*, 325.

Romani pueri longis rationibus assem
Discunt in partes centum *diducere. Dicat*
Filius Albini, si de quincunce *remota est*

---

(18) It has been observed, that this act has produced a greater number of judicial decisions than any other which has passed since the statute of frauds. It was, however, repealed by the 53 G. 3. c. 141., which directs, that within thirty days after the execution of any assurance creating an annuity or rent-charge for life or years determinable on lives, a memorial shall be enrolled according to a form given in the statute. And in case any part of the consideration money be retained or returned on any pretence whatsoever, or supposing it to be advanced in notes, if those notes are not paid when due; or if the consideration, being in goods, is expressed to be in money, then the court, on application of the party against whom any action shall be brought on the deed, may stay the proceedings, or vacate the judgments, and order the deed to be cancelled. The statute also annuls all contracts for annuities made by infants, notwithstanding any confirmation by them after coming of age; and makes it a misdemesnor to endeavour to induce infants to engage in such contracts, or to pledge their word of honour not to plead infancy, or make defence against the demand of such annuities, or to promise to confirm them when of age. The statute does not extend to Scotland or Ireland, nor to annuities, or rent-charges granted by will, marriage-settlement, or for the advancement of a child, nor to the cases excepted out of the former statute, and mentioned in the text.

simae, that is, *four per cent.*; but allowed higher interest to be taken of merchants, because there the hazard was greater. So too Grotius informs us[n] that in Holland the rate of interest was then eight *per cent.* in common loans, but twelve to merchants. And lord Bacon was desirous of introducing a similar policy in England[o]: but our law establishes one standard for all alike, where the pledge of security itself is not put in jeopardy; lest under the general pretence of vague and indeterminate hazards, a door should be open to fraud and usury: leaving specific hazards to be provided against by specific insurances, by annuities for lives, or by loans upon *respondentia* or bottomry. But as to the rate of legal interest, it has varied and decreased for two hundred years past, ac- [463]

> Uncia, *quid superet? poterat dixisse*, triens; *eu*,
> *Rem poteris servare tuam! redit* uncia, *quid fit?*
> Semis. ———

It is therefore to be observed, that in calculating the rate of interest, the Romans divided the principal sum into an *hundred* parts, one of which they allowed to be taken monthly; and this, which was the highest rate of interest permitted, they called *usurae centesimae*, amounting yearly to twelve *per cent.* Now as the *as*, or Roman pound, was commonly used to express any integral sum, and was divisible into twelve parts or *unciae*, therefore these twelve monthly payments or *unciae* were held to amount annually to one pound, or *as usurarius*; and so the *usurae asses* were synonymous to the *usurae centesimae*. And all lower rates of interest were denominated according to the relation they bore to this centesimal usury, or *usurae asses*: for the several multiples of the *unciae*, or duodecimal parts of the *as*, were known by different names according to their different combinations; *sextans*, *quadrans*, *triens*, *quincunx*, *semis*, *septunx*, *bes*, *dodrans*, *dextans*, *deunx*, containing respectively 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, *unciae*, or duodecimal parts of an *as*. [*Ff.* 28. 5. 49. § 2. Gravin. *orig. jur. civ.* 1. 2. § 47.] This being premised, the following table will clearly exhibit at once the subdivisions of the *as*, and the denominations of the rate of interest.

USURAE.	PARTES ASSIS.	PER ANNUM.
Asses, sive centesimae	*integer*	12 *per cent.*
Deunces	$\frac{11}{12}$	11
Dextances, vel decunces	$\frac{5}{6}$	10
Dodrantes	$\frac{3}{4}$	9
Besses	$\frac{2}{3}$	8
Septunces	$\frac{7}{12}$	7
Semisses	$\frac{1}{2}$	6
Quincunces	$\frac{5}{12}$	5
Trientes	$\frac{1}{3}$	4
Quadrantes	$\frac{1}{4}$	3
Sextances	$\frac{1}{6}$	2
Unciae	$\frac{1}{12}$	1

[n] *De jur. b. & p.* 2. 12. 22.

[o] Essays, c. 41.

cording as the quantity of specie in the kingdom has increased by accessions of trade, the introduction of paper credit, and other circumstances. The statute 37 Hen. VIII. c. 9. confined interest to ten *per cent.*, and so did the statute 13 Eliz. c. 8. But as, through the encouragements given in her reign to commerce, the nation grew more wealthy, so under her successor the statute 21 Jac. I. c. 17. reduced it to eight *per cent.*; as did the statute 12 Car. II. c. 13. to six: and lastly by the statute 12 Ann. st. 2. c. 16. it was brought down to five *per cent.* yearly, which is now the extremity of legal interest that can be taken. But yet, if a contract which carries interest be made in a foreign country, our courts will direct the payment of interest according to the law of that country in
[464] which the contract was made [p]. Thus Irish, American, Turkish, and Indian interest, have been allowed in our courts to the amount of even twelve *per cent.*: (19) for the moderation or exorbitance of interest depends upon local circumstances; and the refusal to enforce such contracts would put a stop to all foreign trade. And, by statute 14 Geo. III. c. 79. all mortgages and other securities upon estates or other property in Ireland or the plantations, bearing interest not exceeding six *per cent.* shall be legal; though executed in the kingdom of Great Britain: unless the money lent shall be known at the time to exceed the value of the thing in pledge; in which case also, to prevent usurious contracts at home under colour of such foreign securities, the borrower shall forfeit treble the sum so borrowed. (20)

4. The last general species of contracts, which I have to mention, is that of *debt*; whereby a *chose* in action, or right to a certain sum of money, is mutually acquired and lost [q].

[p] 1 Equ. Cas. Abr. 289. 1 P. Wms. 395. [q] F. N. B. 119.

---

(19) In the case of Indian interest, the legislature has interfered, and by 13 G. 3. c. 63. s. 30. restrained it to 12 *per cent.*

(20) It had been doubted, whether this statute extended to the bonds and covenants of third parties given as a collateral security for the payment in Great Britain of interest on sums of money lent under its protection; the 1 & 2 G. IV. c. 51. was made to remove this doubt, and extends the provisions of the former statute to those cases. See Vol. IV. p. 156. & 172. n. (16).

This may be the counterpart of, and arise from, any of the other species of contracts. As, in case of a sale, where the price is not paid in ready money, the vendee becomes indebted to the vendor for the sum agreed on; and the vendor has a property in this price, as a *chose* in action, by means of this contract of debt. In bailment, if the bailee loses or detains a sum of money bailed to him for any special purpose, he becomes indebted to the bailor in the same numerical sum, upon his implied contract, that he should execute the trust reposed in him, or repay the money to the bailor. Upon hiring or borrowing, the hirer or borrower, at the same time that he acquires a property in the thing lent, may also become indebted to the lender, upon his contract to restore the money borrowed, to pay the price or premium of the loan, the hire of the horse, or the like. Any contract, in short, whereby a determinate sum of money becomes due to any person, and is not paid, but remains in action merely, is a contract of debt. And, taken in this light, it comprehends a great variety of acquisitions; being usually divided into debts [465] of *record*, debts by *special*, and debts by *simple* contract.

A DEBT of *record* is a sum of money, which appears to be due by the evidence of a court of record. Thus, when any specific sum is adjudged to be due from the defendant to the plaintiff, on an action or suit at law; this is a contract of the highest nature, being established by the sentence of a court of judicature. Debts upon recognizance are also a sum of money, recognized or acknowledged to be due to the crown or a subject, in the presence of some court or magistrate, with a condition that such acknowledgment shall be void upon the appearance of the party, his good behaviour, or the like: and these, together with statutes merchant and statutes staple, *&c.* if forfeited by non-performance of the condition, are also ranked among this first and principal class of debts, *viz.* debts of record; since the contract, on which they are founded, is witnessed by the highest kind of evidence, *viz.* by matter of record.

DEBTS by *specialty*, or special contract, are such whereby a sum of money becomes, or is acknowledged to be, due by deed or instrument under seal. Such as by deed of covenant, by deed of sale, by lease reserving rent, or by bond or obligation;

which last we took occasion to explain in the twentieth chapter of the present book; and then shewed that it is a creation or acknowledgment of a debt from the obligor to the obligee, unless the obligor performs a condition thereunto usually annexed, as the payment of rent or money borrowed, the observance of a covenant, and the like; on failure of which the bond becomes forfeited and the debt becomes due in law. (21) These are looked upon as the next class of debts after those of record, being confirmed by special evidence, under seal.

DEBTS by *simple contract* are such, where the contract upon which the obligation arises is neither ascertained by matter of record, nor yet by deed or special instrument, but by mere oral
[466] evidence, the most simple of any; or by notes unsealed, which are capable of a more easy proof, and (therefore only) better, than a verbal promise. It is easy to see into what a vast variety of obligations this last class may be branched out, through the numerous contracts for money, which are not only expressed by the parties, but virtually implied in law. Some of these we have already occasionally hinted at: and the rest, to avoid repetition, must be referred to those particular heads in the third book of these Commentaries, where the breach of such contracts will be considered. I shall only observe at present, that by the statute 29 Car. II. c. 3. no executor or administrator shall be charged upon any special promise to answer damages out of his own estate, and no person shall be charged upon any promise to answer for the debt or default of another, or upon any agreement in consideration of marriage, or upon any contract or sale of any real estate, or upon any agreement that is not to be performed within one year from the making; unless the agreement or some memorandum thereof be in writing, and signed by the party himself, or by his authority. (22)

BUT there is one species of debts upon simple contract, which, being a transaction now introduced into all sorts of

(21) See Vol. III. p. 398. n. (6), and the notes on the cases of *Gainsford* v. *Griffith*, and *Roberts* v. *Marlett*, Saund. R. i. 58, ii. 187. edit. 1824.

(22) See Vol III. p. 159. n (12).

civil life, under the name of *paper credit*, deserves a more particular regard. These are debts by *bills of exchange*, and *promissory notes*.

A BILL *of exchange* is a security, originally invented among merchants in different countries, for the more easy remittance of money from the one to the other, which has since spread itself into almost all pecuniary transactions. It is an open letter of request from one man to another, desiring him to pay a sum named therein to a third person on his account; by which means a man at the most distant part of the world may have money remitted to him from any trading country. If A lives in Jamaica, and owes B, who lives in England, 1000*l.*, now if C be going from England to Jamaica, he may pay B this 1000*l.* and take a bill of exchange drawn by B in England upon A in Jamaica, and receive it when he comes thither. Thus does B receive his debt, at any distance of place, by transferring it to C; who carries over his money in paper credit, without danger of robbery or loss. This method is [467] said to have been brought into general use by the Jews and Lombards, when banished for their usury and other vices; in order the more easily to draw their effects out of France and England into those countries in which they had chosen to reside. But the invention of it was a little earlier; for the Jews were banished out of Guienne in 1287, and out of England in 1290[r]; and in 1236 the use of paper credit was introduced into the Mogul empire in China.[s] In common speech such a bill is frequently called a *draft*, but a *bill of exchange* is the more legal as well as mercantile expression. The person, however, who writes this letter is called, in law the *drawer*, and he to whom it is written the *drawee*; and the third person, or negotiator, to whom it is payable (whether especially named, or the *bearer* generally) is called the *payee*.

THESE bills are either *foreign*, or *inland*; *foreign*, when drawn by a merchant residing abroad upon his correspondent in England, or *vice versa*; and *inland*, when both the drawer and the drawee reside within the kingdom. Formerly foreign

[r] 2 Carte. Hist. Eng. 203. 206. [s] Mod. Un. Hist. iv. 499.

bills of exchange were much more regarded in the eye of the law than inland ones, as being thought of more public concern in the advancement of trade and commerce. But now by two statutes, the one 9 & 10 W. III. c. 17. the other 3 & 4 Ann. c. 9. inland bills of exchange are put upon the same footing as foreign ones; what was the law and custom of merchants with regard to the one, and taken notice of merely as such [t], being by those statutes expressly enacted with regard to the other. So that now there is not in law any manner of difference between them. (23)

Promissory notes, or notes of hand, are a plain and direct engagement in writing, to pay a sum specified at the time therein limited to a person therein named, or sometimes to his order, or often to the bearer at large. These also, by the same statute 3 & 4 Ann. c. 9. are made assignable and indorsable in like manner as bills of exchange. But, by statute 15 Geo. III.
[468] c. 51. all promissory or other notes, bills of exchange, drafts, and undertakings in writing, being negotiable or transferable, for the payment of less than twenty shillings, are declared to be null and void; and it is made penal to utter or publish any such; they being deemed prejudicial to trade and public credit. (24) And by 17 Geo. III. c. 30. all such notes, bills, drafts, and undertakings, to the amount of twenty shillings, and less than five pounds, are subjected to many other regulations and formalities; the omission of any one of which vacates the security, and is penal to him that utters it. (25)

[t] 1 Roll. Abr. 6.

(23) See post, 469, 470.

(24) The 48 G. 3. c. 88. which repealed this statute, contains the same restriction, almost in the same words, and makes the penalty, which cannot exceed 20*l*., nor be less than 5*l*. recoverable before a single justice of the peace; the penalty to go in moieties to the informer and the poor of the parish in which the offence is committed.

(25) This statute, so far as relates to promissory notes, drafts, or undertakings in writing, payable on demand to the bearer, after many suspensions during the late reign, now stands suspended till the 5th day of January 1833. by the 3 G. IV. c. 70. And the 37 G. 3. c. 28. had provided that all notes payable to bearer, and issued by the Bank of England, should be good and valid in law, though for the payment of less than 5*l*.

THE payee, we may observe, either of a bill of exchange or promissory note, has clearly a property vested in him[u] (not indeed in possession but in action) by the *express* contract of the drawer in the case of a promissory note, and, in the case of a bill of exchange, by his *implied* contract, *viz.* that, provided the drawee does not pay the bill, the drawer will: for which reason it is usual in bills of exchange to express that the *value* thereof hath been *received* by the drawer [u]; in order to shew the consideration, upon which the implied contract of repayment arises. And this property, so vested, may be transferred and assigned from the payee to any other man; contrary to the general rule of the common law, that no *chose* in action is assignable: which assignment is the life of paper credit. It may therefore be of some use to mention a few of the principal incidents attending this transfer or assignment, in order to make it regular, and thereby to charge the drawer with the payment of the debt to other persons than those with whom he originally contracted.

IN the first place, then, the payee, or person to whom or whose *order* such bill of exchange or promissory note is payable, may by indorsement, or writing his name *in dorso*, or on the back of it, assign over his whole property to the bearer, or else to another person by name, either of whom is then called the indorsee; and he may assign the same to another, and so on *in infinitum*. And a promissory note, payable to A, or [469
bearer, is negotiable without any indorsement, and payment thereof may be demanded by any bearer of it[v]. But, in case of a bill of exchange, the payee, or the indorsee, (whether it be a general or particular indorsement), is to go to the drawee, and offer his bill for acceptance; which acceptance (so as to charge the drawer with costs) must be in writing, under or on the back of the bill. If the drawee accepts the bill, either verbally or in writing [w], he then makes himself liable to pay it; this being now a contract on his side, grounded on an acknowledgment that the drawer has effects in his hands, or at least credit sufficient to warrant the payment. If the drawee re-

[u] Stra. 1212.
[v] 2 Show. 235. — Grant *v.* Vaughan.
[w] Stra. 1000.

fuses to accept the bill, and it be of the value of 20*l.* or upwards, and expressed to be for value received, the payee or indorsee may protest it for *non-acceptance*; which protest must be made in writing under a copy of such bill of exchange, by some notary public; or, if no such notary be resident in the place, then by any other substantial inhabitant, in the presence of two credible witnesses; and notice of such protest must, within fourteen days after, be given to the drawer. (26)

But, in case such bill be accepted by the drawee, and after acceptance he fails or refuses to pay it within three days after it becomes due, (which three days are called days of grace,) the payee or indorsee is then to get it protested for *non-payment*, in the same manner, and by the same persons who are to protest it in case of non-acceptance, and such protest must also be notified, within fourteen days after, to the drawer. And he, on producing such protest, either of non-acceptance, or non-payment, is bound to make good to the payee, or indorsee, not only the amount of the said bills, (which he is bound to do within a reasonable time after non-payment, without any protest, by the rules of the common

---

(26) A bill need not be presented for acceptance, where it is payable at a certain day, because the time is then running on equally, whether accepted or not; and the responsibility of the drawer is not protracted. If it be payable at a certain distance of time after sight, then it is necessary to present it within a reasonable time, because by not doing so, the risk and responsibility of the drawer are indefinitely protracted. If it be presented for acceptance (which acceptance, in the case of an inland bill, can now only be in writing by 1 & 2 G. IV. c. 78.) whether necessarily or not, the same consequence follows that a prompt notice to the drawer, not as stated in the text, a fourteen days' notice, becomes necessary in case of non-acceptance. The reason of both these rules is ultimately the same; the supposition that the drawee owes the drawer money, or has effects of the drawer's in his hands equivalent to the bill drawn — in the first case that debt, or those effects should not be left indefinitely in his hands, which would be the effect of not presenting the bill; in the latter he should have prompt notice of the non-acceptance to enable him to draw them out, the drawee refusing to apply them to the purpose for which the drawer had destined them. The consequence is, that if the drawer had no effects, nor any ground to expect any in the hands of the drawee, from the time when the bill was drawn until it became payable, and had no other valid foundation to expect payment by the drawee, he is not entitled to notice, because the want of it cannot prejudice him. See Bayley on Bills.

law[x]) but also interest and all charges, to be computed from the time of making such protest. But if no protest be made or notified to the drawer, and any damage accrues by such neglect, it shall fall on the holder of the bill. (27) The bill [470] when refused, must be demanded of the drawer as soon as conveniently may be: for though, when one draws a bill of exchange, he subjects himself to the payment, if the person on whom it is drawn refuses either to accept or pay, yet that is with this limitation, that if the bill be not paid when due, the person to whom it is payable shall in convenient time give the drawer notice thereof; for otherwise the law will imply it paid: since it would be prejudicial to commerce if a bill might rise up to charge the drawer at any distance of time: when in the mean time all reckonings and accounts may be adjusted between the drawer and the drawee[y].

If the bill be an indorsed bill, and the indorsee cannot get the drawee to discharge it, he may call upon either the drawer or the indorser, or if the bill has been negotiated through many hands, upon any of the indorsers; for each indorser is a warrantor for the payment of the bill, which is frequently taken in payment as much (or more) upon the credit of the indorser, as of the drawer. And if such indorser, so called upon, has the names of one or more indorsers prior to his own, to each of whom he is properly an indorsee, he is also at liberty to call upon any of them to make him satisfaction; and so upwards. But the first indorser has no body to resort to, but the drawer only.

What has been said of bills of exchange is applicable also to promissory notes, that are indorsed over, and negotiated

[x] Lord Raym. 993. [y] Salk. 127.

(27) Although the words of the statute of 3 & 4 Anne, c. 9. import *primâ facie*, that it is necessary to protest an inland bill in order to recover special damages and costs occasioned by the non-acceptance or non-payment, together with interest, yet that is not the construction put upon them. The practice is uniformly not to give evidence of any such protest in an action on an inland bill, and that practice being specifically brought under the consideration of the court of K. B. was recently affirmed in the case of *Windle* v. *Andrews*, 2 B. & A. 696.

from one hand to another; only that, in this case, as there is no drawee, there can be no protest for non-acceptance; or rather the law considers a promissory note in the light of a bill drawn by a man upon himself, and accepted at the time of drawing. And, in case of non-payment by the drawer, the several indorsees of a promissory note have the same remedy, as upon bills of exchange, against the prior indorsers.

CHAPTER THE THIRTY-FIRST.

OF TITLE BY BANKRUPTCY.

THE preceding chapter having treated pretty largely of the acquisition of personal property by several commercial methods, we from thence shall be easily led to take into our present consideration a tenth method of transferring property, which is that of

X. BANKRUPTCY; a title which we before lightly touched upon[a], so far as it related to the transfer of the real estate of the bankrupt. At present we are to treat of it more minutely, as it principally relates to the disposition of chattels, in which the property of persons concerned in trade more usually consists, than in lands or tenements. Let us therefore first of all consider, 1. *Who* may become a bankrupt: 2. What *acts* make a bankrupt: 3. The *proceedings* on a commission of bankrupt: and 4. In what manner an estate in goods and chattels may be *transferred* by bankruptcy.

1. WHO may become a bankrupt. A bankrupt was before[b] defined to be "a trader, who secretes himself, or does "certain other acts, tending to defraud his creditors." He was formerly considered merely in the light of a criminal or offender[c]; and in this spirit we are told by sir Edward Coke[d], that we have fetched as well the name, as the wickedness, of bankrupts from foreign nations[e]. But at present the laws of [472]

[a] See page 285.
[b] *Ibid.*
[c] Stat. 1 Jac. I. c. 15. § 17.
[d] 4 Inst. 277.
[e] The word itself is derived from the word *bancus* or *banque*, which signifies the table or counter of a tradesman, (Dufresne, I. 969) and *ruptus*, broken;

bankruptcy are considered as laws calculated for the benefit of trade, and founded on the principles of humanity as well as justice: and to that end they confer some privileges, not only on the creditors, but also on the bankrupt or debtor himself. On the creditors, by compelling the bankrupt to give up all his effects to their use, without any fraudulent concealment: on the debtor, by exempting him from the rigor of the general law, whereby his person might be confined at the discretion of his creditor, though in reality he has nothing to satisfy the debt: whereas the law of bankrupts, taking into consideration the sudden and unavoidable accidents to which men in trade are liable, has given them the liberty of their persons, and some pecuniary emoluments, upon condition they surrender up their whole estate to be divided among their creditors.

In this respect our legislature seems to have attended to the example of the Roman law. I mean not the terrible law of the twelve tables; whereby the creditors might cut the debtor's body into pieces, and each of them take his proportionable share: if indeed that law, *de debitore in partes secando*, is to be understood in so very butcherly a light; which many learned men have with reason doubted[f]. Nor do I mean those less inhuman laws (if they may be called so, as *their* meaning is indisputably certain) of imprisoning the debtor's person in chains; subjecting him to stripes and hard labour, at the mercy of his rigid creditor; and sometimes selling him, his wife, and children, to perpetual foreign slavery, *trans* Tiberim[g]: an oppression which produced so
[473] many popular insurrections, and secessions to the *mons sacer*.

denoting thereby one whose shop or place of trade is broken and gone; though others rather choose to adopt the word *route*, which in French signifies a trace or track, and tell us that a bankrupt is one who hath removed his banque, leaving but a trace behind. (4 Inst. 277.) And it is observable that the title of the first English statute concerning this offence, 34 & 35 Hen. VIII. c. 4., "against such persons as do make bankrupt," is a literal translation of the French idiom, *qui font banqueroute*.

[f] Taylor, *Comment. in L. decemviral.* Bynkersh. *Observ. Jur. I.* 1. Heinecc. *Antiq. III.* 30. 4.

[g] In Pegu and the adjacent countries in East India, the creditor is entitled to dispose of the debtor himself, and likewise of his wife and children; insomuch that he may even violate with impunity the chastity of the debtor's wife, but then, by so doing, the debt is understood to be discharged. (Mod. Un. Hist. vii. 128.)

But I mean the law of *cession*, introduced by the christian emperors; whereby if a debtor *ceded*, or yielded up all his fortune to his creditors, he was secured from being dragged to a gaol, "*omni quoque corporali cruciatu semoto* [h]." For, as the emperor justly observes [i], "*inhumanum erat spoliatum fortunis* "*suis in solidum damnari.*" Thus far was just and reasonable: but, as the departing from one extreme is apt to produce it's opposite, we find it afterwards enacted [k], that if the debtor by any unforeseen accident was reduced to low circumstances, and would *swear* that he had not sufficient left to pay his debts, he should not be compelled to cede or give up even that which he had in his possession: a law, which under a false notion of humanity, seems to be fertile of perjury, injustice, and absurdity.

THE laws of England, more wisely, have steered in the middle between both extremes: providing at once against the inhumanity of the creditor, who is not suffered to confine an honest bankrupt after his effects are delivered up; and at the same time taking care that all his just debts shall be paid, so far as the effects will extend. But still they are cautious of encouraging prodigality and extravagance by this indulgence to debtors; and therefore they allow the benefit of the laws of bankruptcy to none but actual *traders*; since that set of men are, generally speaking, the only persons liable to accidental losses, and to an inability of paying their debts, without any fault of their own. If persons in other situations of life run in debt without the power of payment, they must take the consequences of their own indiscretion, even though they meet with sudden accidents that may reduce their fortunes; for the law holds it to be an unjustifiable practice, for any person but a trader to encumber himself with debts of any considerable value. If a gentleman, or one in a liberal profession, at the time of contracting his debts, [474] has a sufficient fund to pay them, the delay of payment is a species of dishonesty, and a temporary injustice to his creditor: and if, at such time, he has no sufficient fund, the dishonesty and injustice is the greater. He cannot therefore murmur, if he suffers the punishment which he has voluntarily drawn

[h] *Cod.* 7. 71. *per tot.* [i] *Inst.* 4. 6 40 [k] *Nov.* 135. *c.* 1.

upon himself. But in mercantile transactions the case is far otherwise. Trade cannot be carried on without mutual credit on both sides: the contracting of debts is therefore here not only justifiable, but necessary. And if by accidental calamities, as by the loss of a ship in a tempest, the failure of brother traders, or by the non-payment of persons out of trade, a merchant or trader becomes incapable of discharging his own debts, it is his misfortune and not his fault. To the misfortunes therefore of debtors, the law has given a compassionate remedy, but denied it to their faults: since, at the same time that it provides for the security of commerce, by enacting that every considerable trader may be declared a bankrupt, for the benefit of his creditors as well as himself, it has also (to discourage extravagance) declared that no one shall be capable of being made a bankrupt, but only a *trader*; nor capable of receiving the full benefit of the statutes, but only an *industrious* trader.

The first statute made concerning any English bankrupts, was 34 & 35 Hen. VIII. c. 4., when trade began first to be properly cultivated in England; which has been almost totally altered by statute 13 Eliz. c. 7., whereby bankruptcy is confined to such persons only as have *used the trade of merchandize*, in gross or by retail, by way of bargaining, exchange, rechange, bartering, chevisance [l], or otherwise; or have *sought their living by buying and selling*. And by statute 21 Jac. I. c. 19. persons using the trade or profession of a *scrivener*, receiving other men's monies and estates into their trust and custody, are also made liable to the statutes of bankruptcy: and the be-
[475] nefits as well as the penal parts of the law, are extended as well to *aliens* and *denizens* as to natural-born subjects; being intended entirely for the protection of trade, in which aliens are often as deeply concerned as natives. By many subsequent statutes, but lastly by statute 5 Geo. II. c. 30. [m], *bankers*, *brokers*, and *factors*, are declared liable to the statutes of bankruptcy; and this upon the same reason that scriveners are included by the statute of James I., *viz.* for the relief of their creditors; whom they have otherwise more opportunities of defrauding than any other set of dealers, and they are pro-

[l] That is, making contracts. (Dufresne, II. 569.)

[m] § 39.

perly to be looked upon as traders, since they make merchandize of money, in the same manner as other merchants do of goods and other moveable chattels. But by the same act [n], no *farmer*, *grazier*, or *drover*, shall (as such) be liable to be deemed a bankrupt: for, though they buy and sell corn, and hay, and beasts, in the course of husbandry, yet trade is not their principal, but only a collateral object: their chief concern being to manure and till the ground, and make the best advantage of its produce. And, besides, the subjecting them to the laws of bankruptcy might be a means of defeating their landlords of the security which the law has given them above all others, for the payment of their reserved rents; wherefore also, upon a similar reason, a *receiver of the king's taxes* is not capable [o], as such, of being a bankrupt; lest the king should be defeated of those extensive remedies against his debtors, which are put into his hands by the prerogative. By the same statute [p], no person shall have a commission of bankrupt awarded against him, unless at the petition of some *one* creditor, [or more, being partners] to whom he owes 100*l.*; or of *two*, to whom he is indebted 150*l.*; or of *more*, to whom altogether he is indebted 200*l.* For the law does not look upon persons, whose debts amount to less, to be traders considerable enough, either to enjoy the benefit of the statute themselves, or to entitle the creditors, for the benefit of public commerce, to demand the distribution of their effects.

In the interpretation of these several statutes, it hath been [476] held, that buying only, or selling only, will not qualify a man to be a bankrupt; but it must be both buying and selling, and also getting a livelihood by it. As, by exercising the calling of a merchant, a grocer, a mercer, or in one general word, a *chapman*, who is one that buys and sells any thing. But no handicraft occupation (where nothing is bought and sold, and where therefore an extensive credit, for the stock in trade, is not necessary to be had) will make a man a regular bankrupt; as that of a husbandman, a gardener, and the like, who are paid for their work and labour [q]. Also an innkeeper cannot, as such, be a bankrupt [r]: for his gain or livelihood does not

[n] § 40.
[o] § *eod.*
[p] § 23.
[q] Cro. Car. 31.
[r] Cro. Car. 549. Skinn. 291.

arise from buying and selling in the way of merchandize, but greatly from the use of his rooms and furniture, his attendance and the like; and though he may buy corn and victuals, to sell again at a profit, yet that no more makes him a trader, than a schoolmaster or other person is, that keeps a boarding-house, and makes considerable gains by buying and selling what he spends in the house; and such a one is clearly not within the statutes [s]. But where persons buy goods, and make them up into saleable commodities, as shoemakers, smiths, and the like; here, though part of the gain is by bodily labour, and not by buying and selling, yet they are within the statutes of bankrupts [t]: for the labour is only in melioration of the commodity, and rendering it more fit for sale.

One single act of buying and selling will not make a man a trader; but a repeated practice, and profit by it. Buying and selling bank-stock, or other government securities, will not make a man a bankrupt, they not being goods, wares, or merchandize, within the intent of the statute, by which a profit may be fairly made [u]. Neither will buying and selling under particular restraints, or for particular purposes; as if a commissioner of the navy uses to buy victuals for the fleet, and dispose of the surplus and refuse, he is not thereby made a trader within the statutes [w]. An infant, though a trader, cannot be made a bankrupt; for an infant can owe nothing but for necessaries; and the statutes of bankruptcy create no new debts, but only give a speedier and more effectual remedy for recovering such as were before due: and no person can be made a bankrupt for debts, which he is not liable at law to pay [x]. But a feme-covert in London, being a sole trader according to the custom, is liable to a commission of bankrupt [y]. (1)

[477]

[s] Skinn. 292. 3 Mod. 330.
[t] Cro. Car. 31. Skinn. 292.
[u] 2 P. Wms. 308.
[w] Salk. 110. Skinn. 292.
[x] Lord Raym. 443.
[y] *La Vie* v. *Philips*, M. 6 Geo. III. B. R. 3 Burr. 1776.

(1) The subject of the bankrupt laws has been repeatedly under the consideration of parliament, and at length an act of consolidation (the 5 G. IV. c. 98.) has passed, by which all former statutes stand repealed from May 1825. By the second section of this act, the persons who may become

2. HAVING thus considered who may, and who may not, be made a bankrupt, we are to inquire, secondly, by what *acts* a man may become a bankrupt. "A bankrupt is a trader, who "secretes himself, or does certain other acts, tending to de- "fraud his creditors" We have hitherto been employed in explaining the former part of this description, "a trader;" let us now attend to the latter, "who secretes himself, or does cer- "tain other acts tending to defraud his creditors." And, in general, whenever such a trader, as is before described, hath endeavoured to avoid his creditors, or evade their just demands, this hath been declared by the legislature to be an act of bankruptcy, upon which a commission may be sued out. For in this extrajudicial method of proceeding, which is allowed merely for the benefit of commerce, the law is extremely watchful to detect a man, whose circumstances are declining, in the first instance, or at least as early as possible: that the creditors may receive as large a proportion of their debts as may be; and that a man may not go on wantonly wasting his substance, and then claim the benefit of the statutes, when he has nothing left to distribute.

To learn what the particular acts of bankruptcy are, which render a man a bankrupt, we must consult the several statutes,

---

become bankrupts are thus enumerated: "all bankers, brokers, underwriters and persons insuring against perils of the sea, warehousemen, wharfingers, packers, builders, carpenters, shipwrights, victuallers, innkeepers, stage-coach proprietors, brewers, maltsters, dyers, printers, bleachers, fullers, scavengers, manufacturers of alum or kelp, cattle or sheep salesmen, and all persons engaged in any traffic of drawing and redrawing, negotiating or discounting bills of exchange, promissory notes, or negotiable securities, except exchequer, navy, or victualling bills, or ordnance debentures; and all persons making bricks, or burning lime for sale, being tenants, lessees, or partners in such trade or undertaking; and all persons using the trade of merchandise by way of bargaining, exchange, bartering, commission, consignment, or otherwise, in gross or by retail; and all persons, who, either for themselves, or as agents or factors for others, seek their living by buying and selling, or by buying and letting for hire, or by the workmanship of goods or commodities, shall be deemed traders, liable to become bankrupt; provided that no farmer, grazier, common labourer, or workman for hire, receiver-general of the taxes, or member of, or subscriber to any incorporated, commercial, or trading companies established by charter, or by or under the authority of any act of parliament, shall be deemed, as such, a trader liable by virtue of this act to become bankrupt."

and the resolutions formed by the courts thereon. Among
[478] these may therefore be reckoned, 1. Departing from the realm, whereby a man withdraws himself from the jurisdiction and coercion of the law, with intent to defraud his creditors [z]. 2. Departing from his own house, with intent to secrete himself, and avoid his creditors [a]. 3. Keeping in his own house, privately, so as not to be seen or spoken with by his creditors, except for just and necessary cause; which is likewise construed to be an intention to defraud his creditors, by avoiding the process of the law [b]. 4. Procuring or suffering himself willingly to be arrested, or outlawed, or imprisoned, without just and lawful cause; which is likewise deemed an attempt to defraud his creditors [c]. 5. Procuring his money, goods, chattels, and effects to be attached, or sequestered by any legal process; which is another plain and direct endeavour to disappoint his creditors of their security [d]. 6. Making any fraudulent conveyance to a friend, or secret trustee, of his lands, tenements, goods, or chattels: which is an act of the same suspicious nature with the last [e]. 7. Procuring any protection, not being himself privileged by parliament, in order to screen his person from arrests; which also is an endeavour to elude the justice of the law [f]. 8. Endeavouring or desiring, by any petition to the king, or bill exhibited in any of the king's courts against any creditors, to compel them to take less than their just debts; or to procrastinate the time of payment originally contracted for; which are an acknowledgment of either his poverty or his knavery [g]. 9. Lying in prison for two months, or more, upon arrest or other detention for debt, without finding bail, in order to obtain his liberty [h]. For the inability to procure bail, argues a strong deficiency in his credit, owing either to his suspected poverty, or ill character; and his neglect to do it, if able, can arise only from a fraudulent intention; in either of which cases it is high time for his creditors
[479] to look to themselves, and compel a distribution of his effects. 10. Escaping from prison after an arrest for a just debt of 100*l.* or upwards [i]. For no man would break prison that was able

[z] Stat. 13 Eliz. c. 7.
[a] Stat. 1 Jac. I. c. 15.
[b] Stat. 13 Eliz. c. 7.
[c] Stat. 1 Jac. I. c. 15.
[d] *Ibid.*
[e] Stat. 1 Jac. I. c. 15.
[f] Stat. 21 Jac. I. c. 19.
[g] *Ibid.*
[h] *Ibid.*
[i] *Ibid.*

and desirous to procure bail; which brings it within the reason of the last case. 11. Neglecting to make satisfaction for any just debt to the amount of 100*l.* within two months after service of legal process, for such debt, upon any trader having privilege of parliament [k]. (2)

THESE are the several acts of bankruptcy, expressly defined by the statutes relating to this title: which being so numerous,

[k] Stat. 4 Geo. III. c. 33.

---

(2) The 5 G. IV. c. 98. last mentioned, has increased the number of acts by which a man may become a bankrupt. In the first class are the following particulars, all which must be done with intent to defeat or delay creditors. 1st, Departing the realm, or, being out of it, the remaining abroad; 2d, The departing from one's dwelling-house, absenting oneself, or beginning to keep house; 3d, Suffering an arrest for a debt not due, yielding oneself to prison, suffering an outlawry to take place, or procuring an arrest of one's person, or execution of one's goods; 4th, Making either within the United Realm or elsewhere, any grant or conveyance of one's lands, tenements, or chattels.

In the 2d class are comprised, 1st, A declaration or admission by any trader at a meeting of his creditors, that he is insolvent; 2d, A lying in prison twenty-one days upon any arrest for debt, or attachment for non-payment of money; 3d, An escape from prison when so arrested or attached.

The particular acts in the 3d class will not be available to support a commission unless it be sued out within two months after notice of the acts done in the London Gazette: they are 1st, The petitioning to take the benefit of the insolvent act; 2d, A written declaration of insolvency, filed in the office of the secretary of bankrupts with the trader's signature, and the attestation of some attorney. And this last act will support a commission, even though it has been concerted between the bankrupt, and any of his creditors.

4th, Payment of money after a docket struck, to the petitioning creditor, or giving him security for his debt, so that he may receive a larger proportion than the other creditors, is another head; attended with a forfeiture by the creditor of his whole debt, and the money or security so given. But the commission may still be declared valid, or superseded by the lord chancellor, as seems most expedient.

The 5th class applies to traders having privilege of parliament, and contains two cases, 1st, The not paying, securing, or compounding for a debt, or entering into a bond with two sureties for the payment of the sum that shall be recovered, and entering an appearance within one month from the personal service of a summons in an action for the debt; 2d, The disobedience for eight days to any order made by a court of equity for the payment of money, in any matter of bankruptcy or lunacy. These acts of bankruptcy relate back to the time of the service of the summons, or order respectively.

and the whole law of bankrupts being an innovation on the common law, our courts of justice have been tender of extending or multiplying acts of bankruptcy by any construction, or implication. And therefore sir John Holt held [l], that a man's removing his goods privately to prevent their being seised in execution, was no act of bankruptcy. For the statutes mention only fraudulent gifts to third persons, and procuring them to be seised by sham process in order to defraud creditors: but this, though a palpable fraud, yet falling within neither of those cases, cannot be adjudged an act of bankruptcy. So also it has been determined expressly, that a banker's stopping or refusing payment is no act of bankruptcy; for it is not within the description of any of the statutes, and there may be good reasons for his so doing, as suspicion of forgery, and the like: and if, in consequence of such refusal, he is arrested, and puts in bail, still it is no act of bankruptcy [m]: but if he goes to prison, and lies there two months, then, and not before, he is become a bankrupt.

We have seen *who* may be a bankrupt, and what *acts* will make him so: let us next consider,

3. The *proceedings* on a commission of bankrupt: so far as they affect the bankrupt himself. And these depend entirely
[480] on the several statutes of bankruptcy; all which I shall endeavour to blend together, and digest into a concise methodical order.

And, first, there must be a *petition* to the lord chancellor by one creditor [or of two or more, being partners] to the amount of 100*l.*, or by two to the amount of 150*l.*, or by three or more to the amount of 200*l.*; which debts must be proved by *affidavit* [n]. upon which he grants a *commission* to such discreet persons as to him shall seem good, who are then stiled commissioners of bankrupt [o]. The petitioners, to prevent malicious applications, must be bound in a security of 200*l.* to make the party amends in case they do not prove him a bankrupt. And if, on the other hand, they receive any money or

[l] Lord Raym. 725.
[m] 7 Mod. 189.
[n] Stat. 5 Geo. II. c. 30.
[o] Stat. 13 Eliz. c. 7.

effects from the bankrupt, as a recompense for suing out the commission, so as to receive more than their rateable dividends of the bankrupt's estate, they forfeit not only what they shall have so received, but their whole debt. These provisions are made as well to secure persons in good credit from being damnified by malicious petitions, as to prevent knavish combinations between the creditors and bankrupt, in order to obtain the benefit of the commission. When the commission is awarded and issued, the commissioners are to meet, at their own expence, and to take an oath for the due execution of their commission, and to be allowed a sum not exceeding 20*s.* *per diem* each at every sitting. And no commission of bankrupt shall abate, or be void, upon any demise of the crown.[p] (3)

[p] Stat. 5 Geo. II. c. 30.

---

(3) The statute last mentioned makes no alteration in the amount of the petitioning creditor's debt, but provides that a *bonâ fide* debt not due, but payable *in futuro*, and whether secured or not, shall be sufficient. The petitioner must give the same bond with the same condition as before; upon failure in which, and proof that the commission was sued out fraudulently or maliciously, the lord chancellor may, upon petition, order satisfaction to the party grieved, and assign the bond to him for the better recovery thereof. Upon nearly similar words in the 5 G. II. c. 30., it has been held that the chancellor may order a specific sum to be paid by way of damages, and assign the bond for recovery of that specific sum, or may leave the amount of damages open to be determined by action; but that in either case he is the sole judge of the fraud or malice. And therefore Lord Eldon has said that he is not in the habit of assigning the bond, because that is conclusive at law against the defendant, without being more advantageous to the party injured, who may have a better remedy by an action on the case. *Smith* v. *Broomhead*, 7 T. R. 300. *Ex parte* Fletcher 1 Rose, 454. The commissioners as before are to take an oath for the due execution of their commission, and to be allowed 20*s.* each for every meeting, for their certificate of the choice of assignees, and for the signature of the bankrupt's certificate. No commission is to abate by the demise of the crown, or the death of the bankrupt after adjudication that he is such; and in case of the death of any of the commissioners, it may be renewed upon payment of half the fees.

By this statute auxiliary commissions may be granted to take the proof of debts under 20*l.*, and for the examination of witnesses in which latter case, the commissioners have the same necessary powers for making the examination effectual, which are granted to original commissioners.

When the commissioners have received their commission, they are first to receive proof of the person's being a trader, and having committed some act of bankruptcy; (4) and then to declare him a bankrupt, if proved so; and to give notice thereof in the Gazette, and at the same time to appoint three meetings. At one of these meetings an election must be made of assignees, or persons to whom the bankrupt's estate shall be assigned, and in whom it shall be vested for the benefit of
[481] the creditors; which assignees are to be chosen by the major part, in value, of the creditors who shall then have proved their debts; but may be originally appointed by the commissioners, and afterwards approved or rejected by the creditors: but no creditor shall be admitted to vote in the choice of assignees, whose debt on the balance of accounts does not amount to 10*l.* (5) And at the third meeting, at farthest,

---

(4) By a general order of Lord Loughborough's (Nov. 1798.), the commissioners ought first to have the petitioning creditor before them, and examine into the nature and consideration of his debt. And they cannot dispense with this but by the special permission of the chancellor. Further, by the same general order, they must enter on their proceedings a deposition of the creditor, stating the nature and amount of the debt, how and for what consideration it arose, and the time when it accrued due. It had been usual to rely on the affidavit on which the petition was grounded; and even now the evidence in this stage is entirely *ex parte;* but it is the practice, and understood to be the duty of the commissioners to inquire minutely into the debt, and not to adjudicate without a full conviction of its fairness. The 5 G. IV. c. 98. now in terms requires them to adjudicate upon proof made *before them* of the petitioning creditor's debt.

(5) The assignees under the 5 G. IV. c. 98. are to be chosen at the second meeting; the same amount of debt proved is the necessary qualification for voting; but creditors may vote by attorney properly authorised, and the commissioners may reject any person when elected, whom they deem for any reason unfit for the office; as the lord chancellor may at any time remove an improper assignee, and order a new election. Prior, however, to the election of assignees, the commissioners may appoint provisional assignees, in whom, by their mere appointment in writing, all the bankrupt's real and personal estate become vested at once. The object of this is the immediate security of the estate and effects, especially from process at the suit of the crown, which would reach the property if issued before actual assignment to some third person. The choice of new assignees, and their written acceptance of the office, when verified by the commissioners, divest the estate of the provisional assignees; and they must, within

which must be on the forty-second day after the advertisement in the Gazette (unless the time be enlarged by the lord chancellor,) the bankrupt, upon notice also personally served upon him, or left at his usual place of abode, must surrender himself personally to the commissioners: which surrender (if voluntary) protects him from all arrests till his final examination is past: and he must thenceforth in all respects conform to the directions of the statutes of bankruptcy; or, in default of either surrender or conformity, shall be guilty of felony without benefit of clergy, and shall suffer death, and his goods and estates shall be distributed among his creditors [q]. (6)

In case the bankrupt absconds, or is likely to run away, between the time of the commission issued, and the last day of surrender, he may by warrant from any judge or justice of the peace be apprehended and committed to the county gaol, in order to be forthcoming to the commissioners; who are also empowered immediately to grant a warrant for seizing his goods and papers [r]. (7)

When the bankrupt appears, the commissioners are to examine him touching all matters relating to his trade and effects. They may also summon before them, and examine, the bankrupt's wife [s], and any other person whatsoever, as to all matters relating to the bankrupt's affairs. And in case any of them shall refuse to answer, or shall not answer fully, to any lawful question, or shall refuse to subscribe such their

[q] Stat. 5 Geo. II. c. 30.
[r] *Ibid.*
[s] Stat. 21 Jac. I. c. 19.

---

within ten days after notice, deliver up whatever effects may have come to their possession, under a penalty of 200*l.*

(6) These defaults will for the future, by the 5 G. IV. c. 98., be punishable only by transportation for life, or any term not less than seven years; or by imprisonment with or without hard labour, for any term not exceeding seven years.

(7) The commissioners by the 5 G. IV. c. 98. may, by their own warrants, arrest any bankrupt and cause him to be brought before them, who refuses to attend (after summons) at the time appointed, without lawful impediment so to do.

examination, the commissioners may commit them to prison without bail, till they submit themselves, and make and sign a full answer; the commissioners specifying in their warrant of commitment the question so refused to be answered. And any gaoler permitting such person to escape, or go out of prison, shall forfeit 500*l.* to the creditors [t]. (8)

[t] Stat. 5 Geo. II. c. 30.

---

(8) The 5 G. IV. c. 98. gives the commissioners the same powers of summoning before them, and examining the bankrupt's wife, and all other persons whom they believe capable of giving information concerning the estate; it imposes also the same penalty on the gaoler in case of an escape; and the same penalty of 100*l.* for refusing to produce his prisoner to any creditor, who shall bring a certificate from the commissioners of his having proved a debt. With regard to the power of committal its regulations are very full; the subject has been, in different instances, much considered, and the extent of the commissioners' authority much canvassed. See *Miller* v. *Seare and others*, 2 Sir W. Bl. R. 1141, and *Doswell* v. *Impey*, 1 B. & C. 163. The object of the present clauses seems to be, to provide as well against the abuse of the power of committal, as for the due execution of it, and the safety of the commissioners, in the honest, though mistaken discharge of their duty. In the first place the warrant of committal must specify the question, for refusing to answer which the party was committed; a formal defect in the statement, however, will not avail for his discharge, for when brought up by writ of habeas corpus, the judge, or court may recommit him, unless he shall show that he has answered all lawful questions; and in such case the prisoner may call on them to look into the whole examination, and determine from that whether his refusal was justifiable or not.

Next, if the party imprisoned brings an action against the commissioner, he must bring it within three months after the fact committed, and give a calendar month's notice of his intention. This notice must specify his cause of action; it must be proved at the trial, and the plaintiff can give no evidence of any cause of action not contained therein.

During the calendar month the commissioner may tender amends to the plaintiff, and if not accepted, may plead it with the general issue, under which all special matter of justification may be given in evidence, or he may join it with any other plea in bar of the action; and if he shall neglect to make the tender, or shall wish to add to it's amount, he may, at any time before issue joined, pay money into court by way of amends.

At the trial the court or judge shall, upon the prayer of the defendant, look into the whole of the examination, though not stated in the warrant; and if upon the whole, the committal appears justifiable, the defendant shall have the same benefit from it as if it had been all stated.

Supposing the committal should be not strictly justifiable, the question for the jury will be the sufficiency of the amends tendered; and if they find

The bankrupt, upon this examination, is bound upon pain of death to make a full discovery of all his estate and effects, as well in expectancy as possession, and how he has disposed of the same; together with all books and writings relating thereto; and is to deliver up all in his own power to the commissioners (except the necessary apparel of himself, his wife, and his children); or, in case he conceals or embezzles any effects to the amount of 20*l.*, or withholds any books or writings with intent to defraud his creditors, he shall be guilty of felony without benefit of clergy; and his goods and estates shall be divided among his creditors [u]. (9) And unless it shall appear, that his inability to pay his debts arose from some casual loss, he may, upon conviction by indictment of such gross misconduct and negligence, be set upon the pillory for two hours, and have one of his ears nailed to the same and cut off [v]. (10)

After the time allowed to the bankrupt for such discovery is expired, any other person voluntarily discovering any part of his estate, before unknown to the assignee, shall be entitled to *five per cent.* out of the effects so discovered, and such farther reward as the assignees and commissioners shall think proper. And any trustee wilfully concealing the estate of any bankrupt, after the expiration of the two-and-forty days, shall forfeit 100*l.* and double the value of the estate concealed, to the creditors [w]. (11)

[u] Stat. 5 Geo. II. c. 30. By the laws of Naples, all fraudulent bankrupts, particularly such as do not surrender themselves within four days, are punished with death; also all who conceal the effects of a bankrupt, or set up a pretended debt to defraud his creditors. (Mod. Un. Hist. xxviii. 320.)

[v] Stat. 21 Jac. I. c. 19.

[w] Stat. 5 Geo. II. c. 30.

---

find a verdict for the defendant on that or any other ground, or if judgment in any way pass for him, he will recover double costs.

(9) These offences, and concealment or embezzlement to the value of 10*l.* not 20*l.* are to be punished under the 5 G. IV. c. 98. in the same manner as the offences stated at p. 481. n. (6).

(10) The 5 G. IV. c. 98. has no clause analogous to this, and the case of gross misconduct or negligence is provided for only by the refusal, or qualified effect of the certificate, which will be hereafter noticed.

(11) The 5 G. IV. c. 98. makes the same provision for rewarding a discovery; and extends the same penalty for concealment to any person, whether trustee or not.

Hitherto every thing is in favour of the creditors; and the law seems to be pretty rigid and severe against the bankrupt; but, in case he proves honest, it makes him full amends for all this rigour and severity. For if the bankrupt hath made an ingenuous discovery (of the truth and sufficiency of which there remains no reason to doubt), and hath conformed in all points to the directions of the law; and if, in consequence thereof, the creditors, or four parts in five of them in number and value (but none of them creditors for less than 20*l.*), will sign a certificate to that purport; the commissioners
[483] are then to authenticate such certificate under their hands and seals, and to transmit it to the lord chancellor, and he, or two of the judges whom he shall appoint, on oath made by the bankrupt that such certificate was obtained without fraud, may allow the same, or disallow it, upon cause shewn by any of the creditors of the bankrupt [x].(12)

If no cause be shewn to the contrary, the certificate is allowed of course; and then the bankrupt is entitled to a decent and reasonable allowance out of his effects, for his future support and maintenance, and to put him in a way of honest industry. This allowance is also in proportion to his former good behaviour, in the early discovery of the decline of his affairs, and thereby giving his creditors a larger dividend. For, if his effects will not pay one-half of his debts, or ten shillings in the pound, he is left to the discretion of

[x] Stat. 5 Geo. II. c. 30.

(12) It might be inferred, from the manner in which this sentence is expressed, that the commissioners authenticated the certificate merely ministerially. The language of the statute 5 G. 2. c. 30. warrants no such inference, nor will that of the 5 G. IV. c. 98.; and it has been determined several times, that they have a discretion as to this, subject to no controul. "They are pledged, by the sanction of an oath, to speak their real sentiments arising from their observation upon the whole of the bankrupt's conduct; and their refusal is to be taken as if they swore they could not grant the certificate." See ex parte King, 11 Ves. 417. 15 Ves. 181. 15 Ves. 126.

The 5 G. IV. c. 98. provides for a decrease in the number and value of the creditors required for the signature of the certificate at certain distances of time from the last examination.

the commissioners and assignees, to have a competent sum allowed him, not exceeding *three per cent.*; but if they pay ten shillings in the pound, he is to be allowed *five per cent.*; if twelve shillings and sixpence, then *seven and a half per cent.*; and if fifteen shillings in the pound, then the bankrupt shall be allowed *ten per cent.*: provided that such allowance do not in the first case exceed 200*l.*, in the second 250*l.*, and in the third 300*l.*[y] (13)

Besides this allowance, he has also an indemnity granted him, of being free and discharged for ever from all debts owing by him at the time he became a bankrupt; even though judgment shall have been obtained against him, and he lies in prison upon execution for such debts; and, for that among other purposes, all proceedings on commissions of bankrupt are, on petition, to be entered of record, as a perpetual bar against actions to be commenced on this account: though, in general, the production of the certificate properly allowed [484] shall be sufficient evidence of all previous proceedings[z]. Thus the bankrupt becomes a clear man again; and, by the assistance of his allowance and his own industry, may become a useful member of the commonwealth: which is the rather to be expected, as he cannot be entitled to these benefits, unless his failures have been owing to misfortunes, rather than to misconduct and extravagance.

For no allowance or indemnity shall be given to a bankrupt, unless his certificate be signed and allowed, as before mentioned; and also, if any creditor produces a fictitious debt, and the bankrupt does not make discovery of it, but suffers the fair creditors to be imposed upon, he loses all

[y] Stat. 5 Geo. II. c. 30. By the Roman law of cession, if the debtor acquired any considerable property subsequent to the giving up of his all, it was liable to the demands of his creditors. (*Ef.* 42, 3. 5.) But this did not extend to such allowance as was left to him on the score of compassion for the maintenance of himself and family. *Si quid misericordiæ causa ei fuerit relictum, puta menstruum vel annuum, alimentorum nomine, non oportet propter hoc bona ejus iterato venundari: nec enim fraudandus est alimentis cottidianis.* (*Ibid. l.* 6.)

[z] Stat. 5 Geo. II. c. 30.

(13) By the 5 G. IV. c. 98. these sums stand respectively raised to four, five, and six hundred pounds.

title to these advantages [a]. Neither can he claim them, if he has given with any of his children above 100*l.* for a marriage portion, unless he had at that time sufficient left to pay all his debts; or if he has lost at any one time 5*l.* or in the whole 100*l.* within a twelvemonth before he became bankrupt, or by any manner of gaming or wagering whatsoever; or within the same time has lost to the value of 100*l.* by stock-jobbing. Also, to prevent the too common practice of frequent and fraudulent or careless breaking, a mark is set upon such as have been once cleared by a commission of bankrupt, or have compounded with their creditors, or have been delivered by an act of insolvency: which is an occasional act, frequently passed by the legislature; (14) whereby all persons whatsoever, who are either in too low a way of dealing to become bankrupts, or, not being in a mercantile state of life, are not included within the laws of bankruptcy, are discharged from all suits and imprisonment, upon delivering up all their estate and effects to their creditors upon oath, at the sessions or assizes; in which case their perjury or fraud is usually, as in case of bankrupts, punished with death. Persons who have been once cleared by any of these methods, and afterwards become bankrupts again, unless they pay fifteen shillings in the pound, are only thereby indemnified as to the confinement of their bodies; but any future estate
[485] they shall acquire remains liable to their creditors, excepting their necessary apparel, household goods, and the tools and implements of their trades [b].

[a] Stat. 24 Geo. II. c. 57. [b] Stat. 5 Geo. II. c. 30.

(14) See Vol. III. p. 416. n. (7). The 5 G. IV. c. 98. makes a similar provision with that stated in the text, as far as regards the effect of a prior bankruptcy, composition, or insolvency; but it imposes no disability in consequence of having given a marriage portion of 100*l.* with a child, nor of gaming, unless 20*l.* be lost in one day, or 200*l.* within a twelvemonth before the bankruptcy; nor of stock-jobbing, unless the sum lost within the same time amount to 200*l.* The statute also takes away the allowance, and prevents or avoids the certificate, if after an act of bankruptcy the bankrupt shall have destroyed or falsified his books, or made or been privy to the making of false entries with intent to defraud his creditors; or concealed property to the value of 10*l.*; or, being privy to the proving of a false debt, shall not have disclosed the same to his assignees.

THUS much for the proceedings on a commission of bankrupt, so far as they affect the bankrupt himself personally. Let us next consider,

4. How such proceedings affect or transfer the *estate* and *property* of the bankrupt. The method whereby a *real* estate, in lands, tenements, and hereditaments, may be transferred by bankruptcy, was shewn under its proper head in a former chapter [c]. (15) At present therefore we are only to consider the transfer of things *personal* by this operation of law.

BY virtue of the statutes before mentioned [d] all the personal estate and effects of the bankrupt are considered as vested by the act of bankruptcy, in the future assignees of his commissioners, whether they be goods in actual *possession*, or debts, contracts, and other choses in *action*; and the commissioners by their warrant may cause any house or tenement of the bankrupt to be broken open, in order to enter upon and seize the same. And when the assignees are chosen or approved by the creditors, the commissioners are to assign every thing over to them; and the property of every part of the estate is thereby as fully vested in them, as it was in the bankrupt himself, and they have the same remedies to recover it [e].

THE property vested in the assignees is the whole that the bankrupt had in himself, at the time he committed the first act of bankruptcy, or that has been vested in him since, before his debts are satisfied or agreed for. Therefore it is usually said, that once a bankrupt, and always a bankrupt; by which is meant, that a plain direct act of bankruptcy once committed cannot be purged or explained away, by any subsequent conduct, as a dubious equivocal act may be [f]; but that, if a commission is afterwards awarded, the commission and the property of the assignees shall have a relation, or reference, back to the first and original act of bankruptcy [g]. Insomuch that all transactions of the bankrupt are from that [486]

[c] pag. 285.
[d] Stat. 1 Jac. I. c. 15. 21 Jac. I. c. 19.
[e] 12 Mod. 324.
[f] Salk. 110.
[g] 4 Burr. 32.

(15) See ante, p. 286. n. (12).

time absolutely null and void, either with regard to the alienation of his property, or the receipt of his debts from such as are privy to his bankruptcy; for they are no longer his property, or his debts, but those of the future assignees. And, if an execution be sued out, but not served and executed on the bankrupt's effects, till after the act of bankruptcy, it is void as against the assignees. But the king is not bound by this fictitious relation, nor is within the statutes of bankrupts [h]; for if, after the act of bankruptcy committed and before the assignment of his effects, an extent issues for the debt of the crown, the goods are bound thereby [i]. In France this doctrine of relation is carried to a very great length; for there every act of a merchant, for ten days *precedent* to the act of bankruptcy, is presumed to be fraudulent, and is therefore void [k]. But with us the law stands upon a more reasonable footing: for, as these acts of bankruptcy may sometimes be secret to all but a few, and it would be prejudicial to trade to carry this notion to it's utmost length, it is provided by statute 19 Geo. II. c. 32. that no money paid by a bankrupt to a *bonâ fide* or real creditor in a course of trade, even after an act of bankruptcy done, shall be liable to be refunded. Nor, by statute 1 Jac. I. c. 15. shall any debtor of a bankrupt, that pays him his debt, without knowing of his bankruptcy, be liable to account for it again. The intention of this relative power being only to reach fraudulent transactions, and not to distress the fair trader. (16)

[h] 1 Atk. 262.

[i] Viner, Abr. t. creditor and bankr. 104.

[k] Sp. L. b. 29. c. 16.

(16) The effect of the 19 G. II. c. 32. is scarcely stated with sufficient precision, as it is confined to money paid in respect of goods bought or bills drawn by the bankrupt in the usual and ordinary course of trade and dealing, before the person receiving it has notice or knowledge of the bankruptcy or insolvency. But the statute so often referred to has embodied these and some later legislative provisions, in restriction of the doctrine of relation.

1st. All conveyances, and all payments by, and all contracts and other dealings with a bankrupt *bonâ fide*, made and entered into more than two calendar months before the date and issuing of the commission; and all executions and distresses for rent against his lands, tenements, or chattels *bonâ fide* levied more than two calendar months before the issuing of the commission shall be valid, notwithstanding any prior act of bankruptcy, if the person so dealing with him, or levying execution or distress, had

THE assignees may pursue any *legal* method of recovering this property so vested in them, by their own authority: but cannot commence a suit in *equity*, nor compound any debts owing to the bankrupt, nor refer any matters to arbitration, without the consent of the creditors, or the major part of them in value, at a meeting to be held in pursuance of notice in the [487] Gazette [1]. (17)

WHEN they have got in all the effects they can reasonably hope for, and reduced them to ready money, the assignees must, after four, and within twelve months after the commission issued, give one and twenty days' notice to the creditors of a meeting for a dividend or distribution; at which time they must produce their accounts, and verify them upon oath if required. (18) And then the commissioners shall direct a divi-

[1] Stat. 5 Geo. II. c. 30.

---

had at the time no notice, actual or constructive, of any prior act of bankruptcy, or stopping of payment.

2d. No real and *bonâ fide* creditor of a bankrupt shall be liable to repay any money *bonâ fide* received of him before the issuing of the commission: if he had not at the time such notice as last mentioned.

3d. No person or company having possession of any personal estate of the bankrupt, nor any debtor of his, shall be endangered by the delivery of such personal estate, or the payment of his debt to the bankrupt or his order; if at the time such person or company, or debtor, had not actual notice of any act of bankruptcy, or stopping of payment.

The statute having distinguished between actual and constructive notice, defines the latter to be, the issuing of a former commission, upon an act of bankruptcy actually committed, if the adjudication has been notified in the Gazette, and may reasonably be presumed to have been seen by the party.

And with reference to the two months in the first rule the statute provides, that if a commission having been superseded, another shall issue within two calendar months, the time shall date from the issuing of the first commission.

(17) By the 5 G. IV. c. 98. the notice of the meeting and of the object of it, must have been given twenty-one days before it takes place; but if no creditor except the assignees should attend, then the written consent of the commissioners will enable the assignees to act in these matters, so as to bind the creditors.

(18) By the 5 G. IV. c. 98., the commissioners are to audit the accounts of the assignees, delivered in upon oath, at a public meeting with twenty-one days' notice, not sooner than four nor later than six months after the bankrupt's last examination.

dend to be made, at so much in the pound, to all creditors who have before proved, or shall then prove, their debts. This dividend must be made equally, and in a rateable proportion, to all the creditors, according to the *quantity* of their debts; no regard being had to the *quality* of them. Mortgages indeed, for which the creditor has a real security in his own hands, are entirely safe; for the commission of bankrupt reaches only the equity of redemption [m]. So are also personal debts, where the creditor has a chattel in his hands, as a pledge or pawn for the payment, or has taken the debtor's lands or goods in execution. And, upon the equity of the statute 8 Ann. c. 14. (which directs, that upon all executions of goods being on any premises demised to a tenant, one year's rent, and no more shall, if due, be paid to the landlord), it hath also been held, that under a commission of bankrupt, which is in the nature of a statute-execution, the landlord shall be allowed his arrears of rent to the same amount, in preference to other creditors, even though he hath neglected to distrain while the goods remained on the premises: which he is otherwise entitled to do for his entire rent, be the *quantum* what it may [n]. (19) But, otherwise, judgments and recognizances (both which are debts of record, and therefore at other times have a priority), and also bonds and obligations by deed or special instrument (which are called debts by specialty, and are usually the next in order), these are all put on a level with debts by mere simple contract, and all
[488] paid *pari passu* [o]. Nay, so far is this matter carried, that by the express provision of the statutes [p] debts, not due at the time of the dividend made, as bonds or notes of hand payable at a future day certain, shall be proved and paid

[m] Finch. Rep. 466.
[n] 1 Atk. 103, 104.
[o] Stat. 21 Jac. I. c. 19.
[p] Stat. 7 Geo. I. c. 31.

(19) This position is erroneous; the landlord's only preference over other creditors, is his right to distrain the goods while on the premises: if he foregoes his opportunity and suffers them to be removed, he stands on a footing with the rest; see ex parte Devine Co. Bankrupt Laws, 177. and *Lee* v. *Lopes*, 15 East, 230. Now indeed by the recent statute, 5 G. IV. c. 98., where an act of bankruptcy has been committed, a distress whether made before or after the issuing of a commission, shall only be available for two years' arrears of rent before the date of the commission; though the landlord may come in as a creditor rateably for the overplus.

equally with the rest[q], allowing a discount or drawback in proportion. And insurances, and obligations upon bottomry or *respondentia*, *bonâ fide* made by the bankrupt, though forfeited after the commission is awarded, shall be looked upon in the same light as debts contracted before any act of bankruptcy[r]. (20)

Within eighteen months after the commission issued, a second and final dividend shall be made, unless all the effects were exhausted by the first[s]. (21) And if any surplus remains, after selling his estates and paying every creditor his full debt, it shall be restored to the bankrupt[t] (22). This is a case which sometimes happens to men in trade, who involuntarily, or at least unwarily, commit acts of bankruptcy, by absconding and the like, while their effects are more than sufficient to pay their creditors. And, if any suspicious or malevolent creditor will take the advantage of such acts, and sue out a commission, the bankrupt has no remedy, but must quietly submit to the effects of his own imprudence; except that, upon satisfaction made to all the creditors, the commis-

[q] Lord Raym. 1549. Stra. 1211.
[r] Stat. 19 G. II. c. 32.
[s] Stat. 5 Geo. II. c. 30.
[t] Stat. 13 Eliz. c. 7.

(20) To these may be added annuity creditors, sureties for the payment of annuity or other debts of the bankrupt, creditors upon contingencies which have not happened at the issuing of the commission, and creditors, who have recovered judgments against the bankrupt, in respect of their costs, though those costs have not been taxed at the time of the bankruptcy. All these are entitled to prove according to the calculated value of their claims.

(21) By the 5 G. 4. c. 98. the 2d dividend will not be final, if at the time any suit at law or in equity be pending, or any part of the bankrupt's estate be undisposed of, or some other estate or effects of his shall subsequently come to the assignees; in which last case the assignees must convert the same, as speedily as they can into money, and divide it within two calendar months after such conversion.

(22) By the 5 G. 4. c. 98. the surplus is not to be handed over to the bankrupt, until all creditors whose debts are by law entitled to carry interest, have received it according to the legal rate on the rate agreed on, if less than the legal rate; and all other creditors who have proved under the commission, have received it at the rate of 4 per cent; in both cases the calculation to be made from the time of proof

sion may be *superseded* [u]. This case may also happen, when a knave is desirous of defrauding his creditors, and is compelled by a commission to do them that justice, which otherwise he wanted to evade. And therefore, though the usual rule is, that all interest on debts carrying interest shall cease from the time of issuing the commission, yet, in case of a surplus left after payment of every debt, such interest shall again revive, and be chargeable on the bankrupt [w], or his representatives. (23)

[u] 2 Ch. Cas. 144. [w] 1 Atk. 244.

---

(23) Three rather important points of bankrupt law require to be shortly noticed; the two first of which arise under the 21 J. 1. c. 19. and 5 G. 2. c. 30., and seem to have been inadvertently passed over in the text; the last was introduced by the 49 G. 3. c. 121. since the death of the author. All these are noticed in the recent statute.

I. The first is adapted to meet the evil of traders, who before they become bankrupts, are allowed to have possession of the goods of others, or having conveyed their own goods to others upon sufficient consideration, to still keep possession, and dispose of them as their own, and in either case are reputed to be the owners of them, and thereby acquire a false credit in the world. If this be done by the consent and permission of the true owner, the penalty to him and the remedy to the creditors is the obvious one of the forfeiture of the goods; and the commissioners by the 21 J. 1. c. 19. and the recent statute are empowered to sell them for the benefit of the general fund. The mischief contemplated by the statutes can arise only, where possession and management raise a strong presumption of ownership. Not to mention therefore the case of land, which is neither within the words or the spirit of the statutes, because possession and ownership of land are so constantly distinct, that the former alone can never acquire a man the false credit of the latter; or that of vessels mortgaged or duly assigned, which for another reason hereafter to be mentioned, is specially excepted out of the statute; it may be laid down as a general rule, that wherever it can be distinctly shewn that there was no reputation of ownership, the goods will not pass to the assignees. This is a question for the jury to determine; but a general line of distinction has been laid down as to the weight of presumption drawn from the consideration, whether the goods were originally the bankrupt's, and having been sold by him, the possession has remained with him without interruption: or being originally the goods of a third person, the bankrupt's is a newly acquired possession. In the first case the presumption of ownership is so strong, that the *onus* of disproving it is cast upon the real owner claiming the goods; in the latter case mere possession may be nothing, and the assignees ought to establish the reputation, by extrinsic evidence. See *Lingard* v. *Messiter*, 1 B. & C. 308.

But

But whatever be the mischief to the public, it is obvious that the penalty on the real owner is heavy, and this consideration introduces two other distinctions. 1st. It may be impossible from the nature, or the situation of the goods, for the real owner to acquire the actual possession of them. Such may be the case of bulky goods in a warehouse, or a ship sold at sea: in such cases if the real owner clothes himself with the actual possession as far, and as soon as the circumstances admit of it, the statute will not apply.

2d. The real owner may have placed the goods in the possession of the bankrupt for a specific purpose, or in a specific character. The convenience of trade renders this necessary, and protects the owner under such circumstances; and the usage of trade in the greater number of instances prevents any mischief arising from such possession, because it prevents it's carrying with it the reputation of ownership. See the cases under this head collected in Selw. Ni. Pri. 215. 6th ed.

II. The second point is the extension of the doctrine of set off to mutual debts and credits, between the bankrupt and other persons. See vol. iii. p. 304. There was much hardship in making a person pay the whole of his debt to the assignees, and allowing him to receive from them only a dividend upon his demand. The 5 G. 2. c. 30. removed this; and now by the recent statute it is provided, that in such cases the commissioners shall state the account, and the balance only be paid or claimed on either side. This rule is to prevail in respect of every debt proveable under the commission: and even in cases where the bankrupt had committed an act of bankruptcy before he had contracted the debt, or the credit was given to him; if such credit was given two calendar months before the date of the commission, and at a time when he who gave it had no notice, actual or constructive, of any act of bankruptcy or stoppage of payment.

III. The third point regards the extent to which the bankrupt is discharged of demands against him, by the allowance of his certificate. Upon this the general principle of the law is, that the certificate bars every demand which might have been proved under the commission. Originally, however, the only demands which could be so proved, were debts actually due at the time of the bankruptcy, and consequently the bankrupt, notwithstanding his certificate, remained liable to answer for the breach of all contracts entered into prior to his bankruptcy, and not then actually broken. This strictness has been relaxed in some instances, as we have seen, by modern statutes; as in the case of future and contingent debts. The bankrupt's liability upon express covenants stood upon the same principle, and the law was, that where a bankrupt was lessee of an estate, which his assignees had taken possession of, he still remained liable to be sued upon the covenants of the lease. The 49 G. 3. c. 121. provided against this hardship; and now by the recent statute, if the assignees accept any lease or agreement for a lease to which a bankrupt is entitled, he shall not be liable for any rent, or the non-performance of any condition or covenant, subsequently to the date of the commission; if the assignees decline the same, he may discharge himself to the same extent by delivering up to the lessor the lease or agreement, within 14 days, after he shall have received notice that the assignees decline to accept it; and if the assignees will not, after

being required, make their election to accept or decline, the lessor may compel them so to do by petition to the Lord Chancellor. This last provision is extended to the case of agreements for the purchase of lands made by any bankrupt, and enables the vendor to call on the assignees in the same way, to make their election whether they will stand to or abandon such agreement.

With regard to leases, it is very commonly an object with lessors to fix the assignees as their tenants, and questions have often arisen under the 49 G. 3. c. 121. as to what is sufficient evidence of their acceptance to bind them. Upon this, the general result of the cases seems to be, that the assignees may do all reasonable acts within a reasonable time, to ascertain whether it will be advantageous for them to take to the estate, and in so doing, and for that purpose, to intermeddle with the property, and yet after all, not be bound to become the tenants of it. See *Turner* v. *Richardson*, 7 East. 335. *Wheeler* v. *Bramah*, 3 Campb. 340.

CHAPTER THE THIRTY-SECOND.

OF TITLE BY TESTAMENT AND ADMINISTRATION.

THERE yet remain to be examined, in the present chapter, two other methods of acquiring personal estates, *viz.* by *testament* and *administration*. And these I propose to consider in one and the same view; they being in their nature so connected and blended together, as makes it impossible to treat of them distinctly, without manifest tautology and repetition.

XI. XII. In the pursuit, then, of this joint subject, I shall, first, inquire into the original and antiquity of testaments and administrations; shall, secondly, shew who is capable of making a last will and testament; shall, thirdly, consider the nature of a testament and it's incidents; shall, fourthly, shew what an executor and administrator are, and how they are to be appointed; and lastly, shall select some few of the general heads of the office and duty of executors and administrators.

First, as to the *original* of testaments and administrations. We have more than once observed, that when property came to be vested in individuals by the right of occupancy, it became necessary for the peace of society, that this occupancy should be continued, not only in the present possessor, but in those persons to whom he should think proper to transfer it; which introduced the doctrine and practice of alienations, gifts, and [490] contracts. But these precautions would be very short and imperfect, if they were confined to the life only of the occupier; for then upon his death all his goods would again become common, and create an infinite variety of strife and confusion. The law of very many societies has therefore

given to the proprietor a right of continuing his property after his death, in such persons as he shall name; and, in defect of such appointment or nomination, or where no nomination is permitted, the law of every society has directed the goods to be vested in certain particular individuals, exclusive of all other persons [a]. The former method of acquiring personal property, according to the express directions of the deceased, we call a *testament*: the latter, which is also according to the will of the deceased, not expressed indeed but presumed by the law [b], we call in England an *administration*; being the same which the civil lawyers term a succession *ab intestato*, and which answers to the descent or inheritance of real estates.

Testaments are of very high antiquity. We find them in use among the antient Hebrews; though I hardly think the example usually given [c], of Abraham's complaining [d] that, unless he had some children of his body, his steward Eliezer of Damascus would be his heir, is quite conclusive to shew that he had made him so by *will*. And indeed a learned writer [e], has adduced this very passage to prove, that in the patriarchal age, on failure of children, or kindred, the servants born under their master's roof succeeded to the inheritance as heirs at law [f]. But, (to omit what Eusebius and others have related of Noah's testament, made in *writing* and witnessed under his *seal*, whereby he disposed of the whole world [g],) I apprehend that a much more authentic instance of the early use of testaments may be found in the sacred writings [h], wherein Jacob
[491] bequeaths to his son Joseph a portion of his inheritance double to that of his brethren: which will we find carried into execution many hundred years afterwards, when the posterity of Joseph were divided into two distinct tribes, those of Ephraim and Manasseh, and had two several inheritances assigned them; whereas the descendants of each of the other patriarchs formed only one single tribe, and had only one lot of inheritance. Solon was the first legislator that introduced wills into Athens [i];

[a] Puff. de. j. n. & g. l. 4. c. 10.
[b] *Ibid.* l. 4. c. 11.
[c] Barbeyr. Puff. 4. 10. 4. Godolph. Orph. Leg. l. 1.
[d] Gen. c. 15.
[e] Taylor's elem. civ. law, 517.
[f] See pag. 12.
[g] Selden. *de succ. Ebr.* c. 24.
[h] Gen. c. 48.
[i] Plutarch. *in vita Solon.*

but in many other parts of Greece they were totally discountenanced [k]. In Rome they were unknown, till the laws of the twelve tables were compiled, which first gave the right of bequeathing [l]: and, among the northern nations, particularly among the Germans [m], testaments were not received into use. And this variety may serve to evince, that the right of making wills, and disposing of property after death, is merely a creature of the civil state [n]; which has permitted it in some countries, and denied it in others: and, even where it is permitted by law, it is subject to different formalities and restrictions in almost every nation under heaven [o].

With us in England this power of bequeathing is coeval with the first rudiments of the law: for we have no traces or memorials of any time when it did not exist. Mention is made of intestacy, in the old law before the conquest, as being merely accidental; and the distribution of the intestate's estate, after payment of the lord's heriot, is then directed to go according to the established law. "*Sive quis incuria sive morte re-*" *pentina, fuerit intestatus mortuus, dominus tamen nullam* "*rerum suarum partem (praeter eam quae jure debetur herioti* "*nomine) sibi assumito. Verum possessiones uxori, liberis, et* "*cognatione proximis, pro suo cuique jure, distribuantur* [p]." But we are not to imagine, that this power of bequeathing extended originally to *all* a man's personal estate. On the contrary, Glanvil will inform us [q], that by the common law, as [492] it stood in the reign of Henry the second, a man's goods were to be divided into three equal parts; of which one went to his heirs or lineal descendants, another to his wife, and a third was at his own disposal: or, if he died without a wife, he might dispose of one moiety, and the other went to his children; and so *e converso*, if he had no children, the wife was entitled to one moiety, and he might bequeath the other; but, if he died without either wife or issue, the whole was at his own disposal [r]. The shares of the wife and children were called their

[k] Pott. Antiq. l. 4. c. 15.
[l] *Inst.* 2. 22. 1.
[m] Tacit. *de mor. Germ.* 20.
[n] See p. 13.
[o] Sp. L. b. 27. c. 1. Vinnius *in Inst.* *l.* 2. *tit.* 10.
[p] *LL. Canut.* c. 68.
[q] *l.* 7. *c.* 5.
[r] Bracton, *l.* 2. *c.* 26. Flet. *l.* 2. c. 57.

reasonable parts; and the writ *de rationabili parte bonorum* was given to recover them [s].

This continued to be the law of the land at the time of *magna carta*, which provides, that the king's debts shall first of all be levied, and then the residue of the goods shall go to the executor to perform the will of the deceased; and, if nothing be owing to the crown, "*omnia catalla cedant defuncto; salvis uxori ipsius et pueris suis rationabilibus partibus suis* [t]." In the reign of king Edward the third this right of the wife and children was still held to be the universal or common law [u]; though frequently pleaded as the local custom of Berks, Devon, and other counties [w]: and sir Henry Finch lays it down expressly [x], in the reign of Charles the first, to be the general law of the land. But this law is at present altered by imperceptible degrees, and the deceased may now by will bequeath the whole of his goods and chattels; though we cannot trace out when first this alteration began. Indeed
[493] sir Edward Coke [y] is of opinion, that this never was the general law, but only obtained in particular places by special custom: and to establish that doctrine, he relies on a passage in Bracton, which, in truth, when compared with the context, makes directly against his opinion. For Bracton [z] lays down the doctrine of the reasonable part to be the common law: but mentions that as a particular exception, which sir Edward Coke has hastily cited for the general rule. And Glanvil, *magna carta*, Fleta, the year-books, Fitzherbert, and Finch, do all agree with Bracton, that this right to the *pars rationabilis* was by the common law: which also continues to this day to

[s] F. N. B. 122.

[t] 9 Hen. III. c. 18.

[u] A widow brought an action of detinue against her husband's executors, *quod cum per consuetudinem totius regni Angliae hactenus usitatam et approbatam, uxores debent et solent a tempore, &c. habere suam rationabilem partem bonorum maritorum suorum: ita videlicet, quod si nullos habuerint liberos, tunc medietatem; et si habuerint, tunc tertiam partem, &c.* and that her husband died worth 200,000 marks, without issue had between them; and thereupon she claimed the moiety. Some exceptions were taken to the pleadings, and the fact of the husband's dying without issue was denied: but the rule of law, as stated in the writ, seems to have been universally allowed. (*M. 30 Edw. III. 25.*) And a similar case occurs in *H. 17 Edw. III.* 9.

[w] *Reg. Brev.* 142. Co. Litt. 176.

[x] Law. 175.

[y] 2 Inst. 33.

[z] *l.* 2. *c.* 26. § 2.

be the general law of our sister kingdom of Scotland [a]. To which we may add, that whatever may have been the custom of later years in many parts of the kingdom, or however it was introduced in derogation of the old common law, the antient method continued in use in the province of York, the principality of Wales, and in the city of London, till very modern times: when, in order to favour the power of bequeathing, and to reduce the whole kingdom to the same standard, three statutes have been provided; the one 4 W. & M. c. 2. explained by 2 & 3 Ann. c. 5. for the province of York; (1) another, 7 & 8 W. III. c. 38. for Wales; and a third, 11 Geo. I. c. 18. for London: whereby it is enacted, that persons within those districts, and liable to those customs, may (if they think proper) dispose of all their personal estates by will; and the claims of the widow, children, and other relations, to the contrary, are totally barred. Thus is the old common law now utterly abolished throughout all the kingdom of England, and a man may devise the whole of his chattels as freely as he formerly could his third part or moiety. In disposing of which, he was bound by the custom of many places (as was stated in a former chapter [b]) to remember his lord and the church, by leaving them his two best chattels, which was the original of heriots and mortuaries; and afterwards he was left at his own liberty to bequeath the remainder as he pleased.

In case a person made no disposition of such of his goods as were testable, whether that were only part or the whole of [494]

[a] Dalrymp. of feud. property, 145. [b] pag. 426.

(1) The statute of W. & M. excepted from its operation the city of Chester as well as York, and the statute of Anne only repeals the exception in respect of York; upon which it is observed, that the custom still prevails as to the former city. Co. Litt. 176. b. n. 5. H. & B's ed. I am not able to state whether Chester has any local custom in this respect, without reference to its being part of the province of York; if not, as it is within the archdeaconry of the same name, which until the 33 of H. 8. formed part of the diocese of Litchfield and Coventry within the province of Canterbury, the exception in the statute of W. & M. seems to have been unnecessary in the first instance, and to have been inserted owing to the framers of the statute not adverting to the time, when it became part of the province of York.

them, he was, and is, said to die intestate; and in such cases it is said, that by the old law the king was entitled to seize upon his goods, as the *parens patriæ*, and general trustee of the kingdom [c]. This prerogative the king continued to exercise for some time by his own ministers of justice; and probably in the county court, where matters of all kinds were determined; and it was granted as a franchise to many lords of manors, and others, who have to this day a prescriptive right to grant administration to their intestate tenants and suitors in their own courts baron and other courts, or to have their wills there proved, in case they made any disposition [d]. Afterwards the crown, in favour of the church, invested the prelates with this branch of the prerogative: which was done, saith Perkins [e], because it was intended by the law, that spiritual men are of better conscience than laymen, and that they had more knowledge what things would conduce to the benefit of the soul of the deceased. The goods therefore of intestates were given to the ordinary by the crown; and he might seise them, and keep them without wasting, and also might give, aliene, or sell them at his will, and dispose of the money *in pios usus*: and if he did otherwise, he broke the confidence which the law reposed in him [f]. So that properly the whole interest and power which were granted to the ordinary, were only those of being the king's almoner within his diocese; in trust to distribute the intestate's goods in charity to the poor, or in such superstitious uses as the mistaken zeal of the times had denominated pious [g]. And, as he had thus the disposition of intestates' effects, the probate of wills of course followed: for it was thought just and natural, that the will of the deceased should be proved to the satisfaction of the prelate, whose right of distributing his chattels for the good of his soul was effectually superseded thereby.

[495] The goods of the intestate being thus vested in the ordinary upon the most solemn and conscientious trust, the reverend prelates were therefore not accountable to any, but to God and themselves, for their conduct [h]. But even in Fleta's time it

[c] 9 Rep. 38.
[d] *Ibid.* 37.
[e] § 486.
[f] Finch. Law. 173, 174.
[g] Plowd. 277.
[h] *Ibid.*

was complained[j], "*quod ordinarii, hujusmodi bona nomine "ecclesiae occupantes, nullam vel saltem indebitam faciunt dis-"tributionem.*" And to what a length of iniquity this abuse was carried most evidently appears from a gloss of pope Innocent IV.[k], written about the year 1250; wherein he lays it down for established canon law, that "*in Britannia tertia "pars bonorum decedentium ab intestato in opus ecclesiae et "pauperum dispensanda est.*" Thus the popish clergy took to themselves[l] (under the name of the church and poor) the whole residue of the deceased's estate, after the *partes rationabiles*, or two-thirds, of the wife and children were deducted; without paying even his lawful debts, or other charges thereon. For which reason it was enacted by the statute of Westm. 2.[m], that the ordinary shall be bound to pay the debts of the intestate so far as his goods will extend, in the same manner that executors were bound in case the deceased had left a will: a use more truly pious, than any *requiem*, or mass for his soul. (2) This was the first check given to that exorbitant power, which the law had entrusted with ordinaries. But, though they were now made liable to the creditors of the intestate for their just and lawful demands; yet the *residuum*, after payment of debts, remained still in their hands, to be applied to whatever purposes the conscience of the ordinary should approve. The flagrant abuses of which power occasioned the legislature again to interpose, in order to prevent the ordinaries from keeping any longer the administration in their own hands, or those of their immediate dependents: and therefore the statute of [496] 31 Edw. III. st. 1. c. 11. provides, that, in case of intestacy, the ordinary shall depute the nearest and most lawful friends of the deceased to administer his goods; which administrators are put upon the same footing, with regard to suits and to

[j] *I. 2. c. 57.* § 10.

[k] *in Decretal. l. 5. t. 3. c. 42.*

[l] The proportion given to the priest, and to other pious uses, was different in different countries. In the archdeaconry of Richmond in Yorkshire, this proportion was settled by a papal bulle, A. D. 1234, (*Regist. honoris de Richm.* 101.) and was observed till abolished by the statute 26 Hen. VIII. c. 15.

[m] 13 Edw. I. c. 19.

(2) In *Snelling's* case, 5 Rep. 83. it was resolved that this statute was but in affirmance of the common law, and that the ordinary was equally bound before it passed.

accounting, as executors appointed by will. This is the original of administrators, as they at present stand; who are only the officers of the ordinary, appointed by him in pursuance of this statute, which singles out the *next and most lawful friend* of the intestate; who is interpreted [n] to be the *next of blood* that is under no legal disabilities. The statute 21 Hen. VIII. c. 5, enlarges a little more the power of the ecclesiastical judge; and permits him to grant administration *either* to the widow, *or* the next of kin, *or* to both of them, at his own discretion; and where two or more persons are in the same degree of kindred, gives the ordinary his election to accept whichever he pleases.

UPON this footing stands the general law of administrations at this day. I shall, in the farther progress of this chapter, mention a few more particulars, with regard to who may, and who may not, be administrator; and what he is bound to do when he has taken this charge upon him: what has been hitherto remarked only serving to shew the original and gradual progress of testaments and administrations; in what manner the latter was first of all vested in the bishops by the royal indulgence; and how it was afterwards, by authority of parliament, taken from them in effect, by obliging them to commit all their power to particular persons nominated expressly by the law.

I PROCEED now, *secondly*, to enquire who may, or may not, make a testament; or what persons are absolutely obliged by law to die intestate. And this law [o] is entirely prohibitory; for, regularly, every person hath full power and liberty to make a will, that is not under some special prohibition by law or custom: which prohibitions are principally upon three
[497] accounts; for want of sufficient discretion; for want of sufficient liberty and free will; and on account of their criminal conduct.

1. IN the first species are to be reckoned infants, under the age of fourteen if males, and twelve, if females; which

[n] 9 Rep. 39. [o] Godolph. Orph. Leg. p. 1. c. 7.

is the rule of the civil law [p]. For, though some of our common lawyers have held that an infant of any age (even four (3) years old) might make a testament [q], and others have denied that under eighteen he is capable [r], yet as the ecclesiastical court is the judge of every testator's capacity, this case must be governed by the rules of the ecclesiastical law. So that no objection can be admitted to the will of an infant of fourteen, merely for want of age: but if the testator was not of sufficient discretion, whether at the age of fourteen or four-and-twenty, that will overthrow his testament. Madmen, or otherwise *non compotes*, idiots or natural fools, persons grown childish by reason of old age or distemper, such as have their senses besotted with drunkenness—all these are incapable, by reason of mental disability, to make any will, so long as such disability lasts. To this class also may be referred such persons as are *born* deaf, blind, and dumb; who as they have always wanted the common inlets of understanding, are incapable of having *animum testandi*, and their testaments are therefore void.

2. Such persons, as are intestable for want of liberty or freedom of will, are by the civil law of various kinds; as prisoners, captives, and the like [s]. But the law of England does not make such persons absolutely intestable: but only leaves it to the discretion of the court to judge, upon the consideration of their particular circumstances of duress, whether or no such persons could be supposed to have *liberum animum testandi*. And, with regard to feme-coverts, our law differs still more materially from the civil. Among the Romans there was no distinction; a married woman was as capable of bequeathing as a feme-sole [t]. But with us a married woman is not only utterly incapable of devising *lands*, being excepted out of the statute of wills, 34 & 35 Hen. VIII. c. 5., but also she is incapable of making a testament of *chattels*, without the licence of her husband. For all her per- [498]

[p] Godolph. p. 1. c. 8. Went. 212. 2 Vern. 104. 469. Gilb. Rep. 74.
[q] Perkins. § 503.
[r] Co. Litt. 89.
[s] Godolph. p. 1. c. 9.
[t] *Ff.* 31. 1. 77.

(3) This has been supposed to be merely an error of the press in Perkins, and that iiii was printed for xiiii. See Co. Litt. 89. n. 6.

sonal chattels are absolutely his; and he may dispose of her chattels real, or shall have them to himself if he survives her: it would be therefore extremely inconsistent to give her a power of defeating that provision of the law, by bequeathing those chattels to another [v]. Yet by her husband's licence she may make a testament [u]; and the husband, upon marriage, frequently covenants with her friends to allow her that licence: but such licence is more properly his assent; for, unless it be given to the particular will in question, it will not be a complete testament, even though the husband beforehand hath given her permission to make a will [w]. Yet it shall be sufficient to repel the husband from his general right of administering his wife's effects; and administration shall be granted to her appointee, with such testamentary paper annexed [x]. So that in reality the woman makes no will at all, but only something like a will [y]; operating in the nature of an appointment, the execution of which the husband, by his bond, agreement, or covenant, is bound to allow. A distinction similar to which we meet with in the civil law. For though a son who was *in potestate parentis* could not by any means make a formal and legal testament, even though his father permitted it [z], yet he might, with the like permission of his father, make what was called a *donatio mortis causa* [a] (4). The queen consort is an exception to this general rule, for she may dispose of her chattels by will without the consent of her lord [b]: and any feme-covert may make her will of goods, which are in her possession *in auter droit*, as executrix or administratix; for these can never be the property of the husband [c]: and if she has any pin-money or separate maintenance, it is said she may dispose of her savings thereout by testament, without the control of her husband [d] (5).

[499]

[v] 4 Rep. 51.
[u] Dr. & St. d. 1. c. 7.
[w] Bro. *Abr. tit. devise.* 34. Stra. 891.
[x] *The King* v. *Bettesworth.* T. 12 Geo. II. B. R. Stra. 1111.
[y] Cro. Car. 376. 1 Mod. 211.
[z] *Ff.* 28. 1. 10.
[a] *Ff.* 39. 6. 10.
[b] Co. Litt. 133.
[c] Godolph. 1. 10.
[d] Prec. Chanc. 44.

(4) See post. 514.

(5) The instrument by which she disposes of it, can, however, hardly be considered a *proper testament*, but rather a writing in the nature of a will, whereby she declares the trust of her separate estate, which the husband, if there be no other trustee, will be bound in equity to perform.

But, if a feme-sole makes her will, and afterwards marries, such subsequent marriage is esteemed a revocation in law and entirely vacates the will [e].

3. PERSONS incapable of making testaments, on account of their criminal conduct, are, in the first place, all traitors and felons, from the time of conviction; for then their goods and chattels are no longer at their own disposal, but forfeited to the king. Neither can a *felo de se* make a will of goods and chattels, for they are forfeited by the act and manner of his death, but he may make a devise of his lands, for they are not subjected to any forfeiture [f]. Outlaws also, though it be but for debt, are incapable of making a will, so long as the outlawry subsists, for their goods and chattels are forfeited during that time [g]. As for persons guilty of other crimes, short of felony, who are by the civil law precluded from making testaments, (as usurers, libellers, and others of a worse stamp,) by the common law their testaments may be good [h]. And in general the rule is, and has been so at least ever since Glanvil's time [i], *quod libera sit cujuscunque ultima voluntas.*

LET us next, *thirdly*, consider what this last will and testament is, which almost every one is thus at liberty to make; or what are the nature and incidents of a testament. Testaments, both Justinian [j] and sir Edward Coke [k] agree to be so called, because they are *testatio mentis*: an etymon which seems to favour too much of the conceit; it being plainly a substantive derived from the verb *testari*, in like manner as *juramentum*, *incrementum*, and others, from other verbs. The definition of the old Roman lawyers is much better than their etymology; "*voluntatis nostrae justa sententia de eo, quod quis "post mortem suam fieri velit* [l]:" which may be thus rendered into English, "the legal declaration of a man's intentions, "which he wills to be performed after his death." It is called *sententia*, to denote the circumspection and prudence with which it is supposed to be made: it is *voluntatis nostrae* [500]

[e] 4 Rep. 60. 2 P. Wms. 624.
[f] Plowd. 261.
[g] Fitz. *Abr. tit. descent.* 16.
[h] Godolph. p. 1. c. 12.
[i] *l.* 7. *c.* 5.
[j] *Inst.* 2. 10.
[k] 1 Inst. 111. 322.
[l] *Ff.* 28. 1. 1.

sententia, because it's efficacy depends on it's declaring the testator's intention, whence in England it is emphatically styled his *will*: it is *justa sententia*; that is, drawn, attested, and published, with all due solemnities and forms of law; it is *de eo, quod quis post mortem suam fieri velit*, because a testament is of no force till after the death of the testator.

These testaments are divided into two sorts; *written*, and *verbal* or *nuncupative*; of which the former is committed to writing, the latter depends merely upon oral evidence, being declared by the testator *in extremis* before a sufficient number of witnesses, and afterwards reduced to writing. A *codicil*, *codicillus*, a little book or writing, is a supplement to a will; or an addition made by the testator, and annexed to, and to be taken as part of, a testament: being for it's explanation, or alteration, or to make some addition to, or else some subtraction from, the former dispositions of the testator [m]. This may also be either written or nuncupative.

But, as nuncupative wills and codicils (which were formerly more in use than at present, when the art of writing is become more universal) are liable to great impositions and may occasion many perjuries, the statute of frauds, 29 Car. 2. c. 3, hath laid them under many restrictions; except when made by mariners at sea, and soldiers in actual service. As to all other persons, it enacts; 1. That no written will shall be revoked or altered by a subsequent nuncupative one, except the same be in the lifetime of the testator reduced to writing, and read over to him, and approved; and unless the same be proved to have been so done by the oaths of three witnesses at the least; who, by statute 4 Ann. c. 16., must be such as are admissible upon trials at common law. 2. That no nuncupative will shall in anywise be good, where the estate bequeathed exceeds 30*l.* unless proved by three such witnesses, present at the making thereof, (the Roman law requiring seven [n],) and unless they or some of them were specially
[501] required to bear witness thereto by the testator himself; and unless it was made in his last sickness, in his own habitation or dwelling-house, or where he had been previously resident

[m] Godolph. p. 1. c. 1. § 8. [n] *Inst.* 2. 10. 14.

ten days at the least [next before the making], except he be surprized with sickness on a journey, or from home, and dies without returning to his dwelling. 3. That no nuncupative will shall be proved by the witnesses after six months from the making, unless it were put in writing within six days. Nor shall it be proved till fourteen days after the death of the testator, nor till process hath first issued to call in the widow, or next of kin, to contest it, if they think proper. Thus hath the legislature provided against any frauds in setting up nuncupative wills, by so numerous a train of requisites, that the thing itself has fallen into disuse, and is hardly ever heard of, but in the only instance where favour ought to be shewn to it, when the testator is surprized by sudden and violent sickness. The testamentary words must be spoken with an intent to bequeath, not any loose idle discourse in his illness; for he must require the by-standers to bear witness of such his intention; the will must be made at home, or among his family or friends, unless by unavoidable accident; to prevent impositions from strangers: it must be in his *last* sickness; for if he recovers, he may alter his dispositions, and has time to make a written will: it must not be proved at too long a distance from the testator's death, lest the words should escape the memory of the witnesses; nor yet too hastily and without notice, lest the family of the testator should be put to inconvenience, or surprized.

As to *written* wills, they need not any witness of their publication. I speak not here of devises of lands, which are quite of a different nature; being conveyances by statute, unknown to the feodal or common law, and not under the same jurisdiction as personal testaments. But a testament of chattels, written in the testator's own hand, though it has neither his name nor seal to it, nor witnesses present at it's publication, is good; provided sufficient proof can be had that it is his hand-writing[o]. And though written in another man's hand, and never signed by the testator, yet if proved [502] to be according to his instructions and approved by him, it hath been held a good testament of the personal estate[p]. Yet

[o] Godolph. p. 1. c. 21. Gilb. Rep. 260.

[p] Comyns, 452, 3, 4.

it is the safer and more prudent way, and leaves less in the breast of the ecclesiastical judge, if it be signed or sealed by the testator, and published in the presence of witnesses: which last was always required in the time of Bracton [q]; or rather, he in this respect has implicitly copied the rule of the civil law.

No testament is of any effect till after the death of the testator. "*Nam omne testamentum morte consummatum est: et "voluntas testatoris est ambulatoria usque ad mortem* [r]." And therefore, if there be many testaments, the last overthrows all the former [s]: but the republication of a former will revokes one of a later date, and establishes the first again [t].

Hence it follows, that testaments may be avoided three ways: 1. If made by a person labouring under any of the incapacities before mentioned: 2. By making another testament of a later date: and, 3. by cancelling or revoking it. For, though I make a last will and testament irrevocable in the strongest words, yet I am at liberty to revoke it; because my own act or words cannot alter the disposition of law, so as to make that irrevocable which is in it's own nature revocable [u]. For this, saith lord Bacon [w], would be for a man to deprive himself of that, which of all other things is most incident to human condition; and that is alteration or repentance. It hath also been held, that, without an express revocation, if a man, who hath made his will, afterwards marries and hath a child, this is a presumptive or implied revocation of his former will, which he made in his state of celibacy [x]. The Romans were also wont to set aside testaments as being *inofficiosa*, deficient in natural duty, if they disinherited or totally passed by (without assigning a true and sufficient
[503] reason [y]) any of the children of the testator [z]. But if the child had any legacy, though ever so small, it was a proof that the testator had not lost his memory or his reason, which other-

[q] *l.* 2. *c.* 26.
[r] Co. Litt. 112.
[s] Litt. § 168. Perk. 478.
[t] Perk. 479.
[u] 8 Rep. 82.
[w] Elem. c. 19.
[x] Lord Raym. 441. 1 P. Wms. 304.
[y] See book I. ch. 16.
[z] *Inst.* 2. 18. 1.

wise the law presumed; but was then supposed to have acted thus for some substantial cause: and in such case no *querela inofficiosi testamenti* was allowed. Hence probably has arisen that groundless vulgar error, of the necessity of leaving the heir a shilling or some other express legacy, in order to disinherit him effectually: whereas the law of England makes no such constrained suppositions of forgetfulness or insanity; and therefore though the heir or next of kin be totally omitted, it admits no *querela inofficiosi*, to set aside such a testament.(6)

---

(6) Upon the three latter modes of avoiding a will, a few general points require to be noticed: 1st, As to the making a testament of later date; supposing this not to be in terms an express revocation, it will not by implication avoid the former testament, unless its dispositions be clearly incompatible with it, and it be an effective will at the death of the testator. *Onions* v. *Tyrer*, 1 P. Wms. 345. 2d, As to cancelling, however decisive the act may be in form, as tearing, defacing, or destroying, yet its effect may be still ambiguous. In order to operate a revocation, it must be done intentionally, with a purpose of revocation; and the act so far as the testator meant to pursue it, must be complete. Farther, the act must not be done with an intention conceived under a manifest mistake; this lets in a class of cases rather difficult to define: thus, if A cancels his will because he conceives he has made another valid will, and that is not the case, it is held that the cancellation is ineffectual. It is obvious to how wide a range this principle may extend; that the testator only intended to revoke upon a false state of facts, taken up in error, or imposed on him by fraud, but did not intend to do so, on the real facts of the case. *Doe* v. *Perkes*, 3 B. & A. 489. *Burtenshaw* v. *Gilbert*, Cowp. 49. 3d, As to marriage and the birth of a child; this will hold even where the birth is posthumous. The principle on which this proceeds is, that a testator makes his will conditionally only, intending it not to take effect in case of a total change in the circumstances of himself and his family. *Doe* v. *Lancashire*, 5 T. R. 49. This rule, therefore, will be open in its application to be affected by circumstances, such as that of the nearer objects being otherwise provided for in the testator's life-time, or by the testator's own act. *Kenebel* v. *Scrafton and others*, 2 East. 530.

In the ecclesiastical courts, the principle of implied revocation has been laid down to be a change of intention produced by, and to be presumed from some new moral obligation arising after the will was made. The circumstances of being childless or unmarried when the will was made, are not therefore essential; thus, the will of a widower with children, was held to be revoked by a second marriage, and the having issue, *Sheath* v. *York*, 1 V. & B. 390.; and in another case the will of a married man with children was also held to be revoked by the birth of other children, strong circumstances concurring to show an intention to make a new will and provide for them. *Johnston* v. *Johnston*, 1 Phillimore's Rep. p.

We are next to consider, *fourthly*, what is an executor, and what an administrator, and how they are both to be appointed.

An executor is he to whom another man commits by will the execution of that his last will and testament. And all persons are capable of being executors, that are capable of making wills, and many others besides; as feme-coverts, and infants: nay, even infants unborn, or *in ventre sa mere*, may be made executors [a]. But no infant can act as such till the age of seventeen years; till which time administration must be granted to some other, *durante minore aetate* [b].(7) In like manner as it may be granted *durante absentia*, or *pendente lite*; when the executor is out of the realm [c], or when a suit is commenced in the ecclesiastical court touching the validity of the will [d]. This appointment of an executor is essential to the making of a will [e]; and it may be performed either by express words, or such as strongly imply the same. But if the testator makes an incomplete will, without naming any executors, or if he names incapable persons, or if the executors named refuse to act; in any of these cases, the ordinary must
[504] grant administration *cum testamento annexo* [f] to some other person; and then the duty of the administrator, as also when he is constituted only *durante minore aetate, &c.* of another, is very little different from that of an executor. And this was law so early as the reign of Henry II.; when Glanvil [g] informs us, that "*testamenti executores esse debent ii, quos testa-*
"*tor ad hoc elegerit, et quibus curam ipse commiserit; si vero*
"*testator nullos ad hoc nominaverit, possunt propinqui et con-*
"*sanguinei ipsius defuncti ad id faciendum se ingerere.*"

[a] West. Symb. p. 1. § 635.
[b] Went. Off. Ex. c. 18.
[c] 1 Lutw. 342.
[d] 2 P. Wms. 589, 590.
[e] Went. c. 1. Plowd. 281.
[f] 1 Roll. Abr. 907. Comb. 20.
[g] l. 7. c. 6.

(7) But by stat. 38 G. 3. c. 87. s. 6., "where an infant is *sole* executor, administration, with the will annexed, shall be granted to the guardian of such infant, or to such other person as the spiritual court shall think fit, until such infant shall have attained the full age of twenty-one years, at which period, and not before, probate of the will shall be granted to him."

But if the deceased died wholly intestate, without making either will or executors, then general letters of administration must be granted by the ordinary to such administrator as the statutes of Edward the third and Henry the eighth, before-mentioned, direct. In consequence of which we may observe; 1. That the ordinary is compellable to grant administration of the goods and chattels of the wife, to the husband or his representatives [h]; and of the husband's effects, to the widow, or next of kin; but he may grant it to either, or both, at his discretion [i]. 2. That among the kindred, those are to be preferred that are the nearest in degree to the intestate; but, of persons in equal degree, the ordinary may take which he pleases [k]. 3. That this *nearness* or propinquity of degree shall be reckoned according to the computation of the civilians [l]; and not of the canonists, which the law of England adopts in the descent of real estates [m]: because in the civil computation the intestate himself is the *terminus, a quo* the several degrees are numbered; and not the common ancestor, according to the rule of the canonists. And therefore in the first place the children, or (on failure of children) the parents of the deceased, are entitled to the administration; both which are indeed in the first degree; but with us [n] the children are allowed the preference [o]. Then follow brothers [p], [505] grandfathers [q], uncles or nephews [r] (and the females of each class respectively), and lastly, cousins. 4. The half blood is admitted to the administration as well as the whole; for they are of the kindred of the intestate, and only excluded from inheritances of land upon feodal reasons. Therefore the

[h] Cro. Car. 106. Stat. 29 Car. II. c. 3. 1 P. Wms. 381.

[i] Salk. 36. Stra. 532.

[k] See page 496.

[l] Prec. Chanc. 593.

[m] See page 203. 207. 224.

[n] Godolph. p. 2. c. 35. § 1 & 2. 2 Vern. 125.

[o] In Germany there was a long dispute whether a man's children should inherit his effects during the life of their grandfather; which depends (as we shall see hereafter) on the same principles as the granting of administrations. At last it was agreed at the diet of Arensberg, about the middle of the tenth century, that the point should be decided by combat. Accordingly, an equal number of champions being chosen on both sides, those of the children obtained the victory, and so the law was established in their favour, that the issue of a person deceased shall be entitled to his goods and chattels in preference to his parents. (Mod. Un. Hist. xxix. 28.)

[p] Harris in *Nov.* 118. c. 2.

[q] Prec. Chanc. 527. 1 P. Wms. 41.

[r] Atk. 455.

brother of the half-blood shall exclude the uncle of the whole blood[s]; and the ordinary may grant administration to the sister of the half, or the brother of the whole blood at his own discretion[t]. 5. If none of the kindred will take out administration, a creditor may, by custom, do it[u]. 6. If the executor refuses, or dies intestate, the administration may be granted to the residuary legatee, in exclusion of the next of kin[w]. 7. And lastly, the ordinary may, in defect of all these, commit administration (as he might have done[x] before the statute of Edward III.) to such discreet person as he approves of: or may grant him letters *ad colligendum bona defuncti*, which neither makes him executor nor administrator; his only business being to keep the goods in his safe custody[y], and to do other acts for the benefit of such as are entitled to the property of the deceased[z]. If a bastard, who has no kindred, being *nullius filius*, or any one else that has no kindred, dies intestate, and without wife or child, it hath formerly been held[a] that the ordinary might seize his goods, and dispose of them *in pios usus*. But the usual course now is for some one to procure letters patent or other authority from the king;
[506] and then the ordinary of course grants administration to such appointee of the crown[b].

The interest, vested in the executor by the will of the deceased, may be continued and kept alive by the will of the same executor: so that the executor of A's executor is, to all intents and purposes, the executor and representative of A himself[c]; but the executor of A's administrator, or the administrator of A's executor, is not the representative of A[d]. For the power of an executor is founded upon the special confidence and actual appointment of the deceased; and such executor is therefore allowed to transmit that power to another, in whom he has equal confidence: but the administrator of A is merely the officer of the ordinary, prescribed to him by act of parliament, in whom the deceased has reposed

[s] 1 Ventr. 425.
[t] Aleyn. 36. Styl. 74.
[u] Salk. 38.
[w] 1 Sid. 281. 1 Ventr. 219.
[x] Plowd. 278.
[y] Wentw. ch. 14.
[z] 2 Inst. 398.
[a] Salk. 37.
[b] 3 P. Wms. 33.
[c] Stat. 25 Edw. III. st. 5. c. 5. 1 Leon. 275.
[d] Bro. *Abr. tit. administrator.* 7.

no trust at all: and therefore on the death of that officer, it results back to the ordinary to appoint another. And with regard to the administrator of A's executor, he has clearly no privity or relation to A; being only commissioned to administer the effects of the intestate executor, and not of the original testator. Wherefore in both these cases, and whenever the course of representation from executor to executor is interrupted by any one administration, it is necessary for the ordinary to commit administration afresh, *of* the *goods* of the deceased *not* administered by the former executor or administrator. And this administrator, *de bonis non*, is the only legal representative of the deceased in matters of personal property [e]. But he may, as well as an original administrator, have only a *limited* or *special* administration committed to his care, *viz.* of certain specific effects, such as a term of years and the like; the rest being committed to others [f].

HAVING thus shewn what is, and who may be, an executor or administrator, I proceed now, *fifthly* and lastly, to inquire into some few of the principal points of their office and duty. These in general are very much the same in both executors and administrators; excepting, first, that the executor is bound to perform a will, which an administrator is not, unless where a testament is annexed to his administration, and then he differs still less from an executor: and secondly, that an executor may do many acts before he proves the will [g], but an administrator may do nothing till letters of administration are issued; for the former derives his power from the will and not from the probate [h], the latter owes his entirely to the appointment of the ordinary. If a stranger takes upon him to act as executor, without any just authority (as by intermeddling with the goods of the deceased [i], and many other transactions [k]) he is called in law an executor of his own wrong, *de son tort*, and is liable to all the trouble of an executorship, without any of the profits or advantages; but merely doing acts of necessity or humanity, as locking [507]

[e] Styl. 225.
[f] 1 Rol. Abr. 908. Godolph. p. 2. c. 30. Salk. 36.
[g] Wentw. ch. 3.
[h] Comyns. 151.
[i] 5 Rep. 33, 34.
[k] Wentw. ch. 14. Stat. 43 Eliz. c. 8.

up the goods, or burying the corpse of the deceased, will not amount to such an intermeddling as will charge a man as executor of his own wrong [l]. Such a one cannot bring an action himself in right of the deceased [m], but actions may be brought against him. And, in all actions by creditors against such an officious intruder, he shall be named an executor, generally [n]; for the most obvious conclusion which strangers can form from his conduct is, that he hath a will of the deceased, wherein he is named executor, but hath not yet taken probate thereof [o]. He is chargeable with the debts of the deceased, so far as assets come to his hands [p]; and, as against creditors in general, shall be allowed all payments made to any other creditor in the same or a superior degree [q], himself only excepted [r]. And though, as against the rightful executor or administrator, he cannot plead such payment, yet it shall be allowed him in mitigation of damages [s]; unless perhaps upon a deficiency of assets, whereby the rightful executor may be prevented from satisfying his own debt [t]. But let us now see what are the power and duty of a rightful executor or administrator.

[508]

1. He must *bury* the deceased in a manner suitable to the estate which he leaves behind him. Necessary funeral expences are allowed, previous to all other debts and charges; but if the executor or administrator be extravagant, it is a species of *devastation* or waste of the substance of the deceased, and shall only be prejudicial to himself, and not to the creditors or legatees of the deceased [u].

2. The executor, or the administrator *durante minore aetate*, or *durante absentia*, or *cum testamento annexo*, must *prove the will* of the deceased: which is done either in *common form*, which is only upon his own oath before the ordinary, or his surrogate; or *per testes*, in more solemn form of law,

[l] Dyer. 166.
[m] Bro. *Abr. tit. administrator.* 8.
[n] 5 Rep. 31.
[o] 12 Mod. 471.
[p] Dyer. 166.
[q] 1 Chan. Cas. 33.
[r] 5 Rep. 30. Moor. 527.
[s] 12 Mod. 441. 471.
[t] Wentw. ch. 14.
[u] Salk. 296. Godolph. p. 2. c. 26. § 2.

in case the validity of the will be disputed [w]. (8) When the will is so proved, the original must be deposited in the registry of the ordinary; and a copy thereof in parchment is made out under the seal of the ordinary, and delivered to the executor or administrator, together with a certificate of it's having been proved before him; all which together is usually stiled the *probate*. In defect of any will, the person entitled to be administrator must also at this period take out letters of administration under the seal of the ordinary; whereby an executorial power to collect and administer, that is, dispose of the goods of the deceased, is vested in him: and he must, by statute 22 & 23 Car. II. c. 10. enter into a bond, with sureties faithfully to execute his trust. If all the goods of the deceased lie within the same jurisdiction, a probate before the ordinary, or an administration granted by him, are [509] the only proper ones: but if the deceased had *bona notabilia*, or chattels to the value of a *hundred shillings*, in two distinct dioceses or jurisdictions, then the will must be proved, or administration taken out, before the metropolitan of the province, by way of special prerogative [x]; whence the courts where the validity of such wills is tried, and the offices where they are registered, are called the prerogative courts, and the prerogative offices, of the provinces of Canterbury and York. Lyndewode, who flourished in the beginning of the fifteenth century, and was official to archbishop Chichele, interprets these hundred shillings to signify *solidos legales*; of which he tells us seventy-two amounted to a pound of gold, which in his time was valued at fifty nobles, or 16*l.* 13*s.* 4*d.* He therefore computes [y] that the hundred shillings, which constituted *bona notabilia*, were then equal in current money to 23*l.* 3*s.* 0½. This will account for what is said in our antient books, that *bona notabilia* in the diocese

[w] Godolph. p. 1. c. 20. § 4.

[x] 4 Inst. 335.

[y] *Provinc. l.* 3. *t.* 13. *c. item. v. centum, &c. statutum v. laicis.*

(8) When the proof is "in form of law," the widow or next of kin are cited to be present, and the will is exhibited in their presence before the judge; witnesses (two at least) are produced, sworn, and examined, and their depositions published; and the judge, if satisfied, pronounces for the validity of the testament. Godolph. p. 1. c. xx. s. 4.

of London [a] and indeed every where else [a], were of the value of ten pounds by *composition*; for if we pursue the calculations of Lyndewode to their full extent, and consider that a pound of gold is now almost equal in value to an hundred and fifty nobles, we shall extend the present amount of *bona notabilia* to nearly 70*l*. But the makers of the canons of 1603 understood this antient rule to be meant of the shillings current in the reign of James I., and have therefore directed [b] that *five pounds* shall for the future be the standard of *bona notabilia*, so as to make the probate fall within the archiepiscopal prerogative. Which prerogative (properly understood) is grounded upon this reasonable foundation: that as the bishops were themselves originally the administrators to all intestates in their own diocese, and as the present administrators are in effect no other than their officers or substitutes, it was impossible for the bishops, or those who acted under them, to collect any goods of the deceased other than such as
[510] lay within their own dioceses, beyond which their episcopal authority extends not. But it would be extremely troublesome, if as many administrations were to be granted, as there are dioceses within which the deceased had *bona notabilia*; besides the uncertainty which creditors and legatees would be at, in case different administrators were appointed, to ascertain the fund out of which their demands are to be paid. A prerogative is therefore very prudently vested in the metropolitan of each province, to make in such cases one administration, serve for all. This accounts very satisfactorily for the reason of taking out administration to intestates, that have large and diffusive property, in the prerogative court: and the probate of wills naturally follows, as was before observed, the power of granting administrations; in order to satisfy the ordinary that the deceased has, in a legal manner, by appointing his own executor, excluded him and his officers from the privilege of administering the effects.

3. The executor or administrator is to make an *inventory* [c] of all the goods and chattels, whether in possession or action,

[a] 4 Inst. 335. Godolph. p. 1. c. 22. [b] can. 92.
[a] Plowd. 281. [c] Stat. 21 Hen. VIII. c. 5.

of the deceased: which he is to deliver in to the ordinary upon oath, if thereunto lawfully required.

4. He is to *collect* all the goods and chattels so inventoried; and to that end he has very large powers and interests conferred on him by law; being the representative of the deceased [d], and having the same property in his goods as the principal had when living, and the same remedies to recover them. And if there be two or more executors, a sale or release by one of them shall be good against all the rest [e]; but in case of administrators it is otherwise [f]. (9) Whatever is so recovered, that is of a saleable nature, and may be converted into ready money, is called *assets* in the hands of the executor or administrator [g]; that is, sufficient or enough (from the French *assez*) to make him chargeable to a creditor or legatee, so far as such goods and chattels extend. Whatever assets so come [511] to his hands he may convert into ready money, to answer the demands that may be made upon him; which is the next thing to be considered; for,

5. The executor or administrator must *pay* the *debts* of the deceased. In payment of debts he must observe the rules of priority: otherwise, on deficiency of assets, if he pays those of a lower degree first, he must answer those of a higher out of his own estate. And, first, he must pay all funeral charges, and the expence of proving the will, and the like. Secondly, debts due to the king on record or specialty [h]. Thirdly, such debts as are by particular statutes to be preferred to all others; as the forfeitures for not burying in woollen [i], money due upon poor-rates [k], for letters to the post-office [l], and some others.

[d] Co. Litt. 209.
[e] Dyer. 23.
[f] 1 Atk. 460.
[g] See page 244.
[h] 1 And. 129.
[i] Stat. 30 Car. II. c. 3. (10.)
[k] Stat. 17 Geo. II. c. 38. (11.)
[l] Stat. 9 Ann. c. 10.

(9) It has been determined since the decision of *Hudson* v. *Hudson*, 1 Atk. 460., both in law and equity, that there is no distinction, in this respect, between executors and administrators; one of the latter has all the power which one of the former has. *Willand* v. *Fenn*, cited in *Jacomb* v. *Harwood*, 2 Ves. Sen. 267.

(10) The 30 C. 2. c. 3. was repealed by the 54 G. 3. c. 108.

(11) This statute only provides that the executors of any person *dying*

Fourthly, debts of record; as judgments, (docquetted according to the statute 4&5 W.&M. c. 20.) (12) statutes and recognizances [m]. Fifthly, debts due on special contracts: as for rent, (for which the lessor has often a better remedy in his own hands, by distreining,) or upon bonds, covenants, and the like, under seal [n]. Lastly, debts on simple contracts, *viz.* upon notes unsealed, and verbal promises. Among these simple contracts, servants' wages are by some [o] with reason preferred to any other: and so stood the antient law, according to Bracton [p] and Fleta [q], who reckon among the first debts to be paid *servitia servientium et stipendia famulorum.* Among debts of equal degree, the executor or administrator is allowed to pay himself first, by retaining in his hands so much as his debt amounts to [r]. But an executor of his own wrong is not allowed to retain: for that would tend to encourage creditors to strive who should first take possession of the goods of the deceased; and would besides be taking advantage of his own
[512] wrong, which is contrary to the rule of law [s]. If a creditor constitutes his debtor his executor, this is a release or discharge of the debt, whether the executor acts or not [t]; provided there be assets sufficient to pay the testator's debts: for though this discharge of the debt shall take place of all legacies, yet it were unfair to defraud the testator's creditors of their just debts by a release which is absolutely voluntary [u]. (13). Also, if no suit is commenced against him, the executor may pay any one creditor in equal degree his whole debt, though

[m] 4 Rep. 60. Cro. Car. 363.
[n] Wentw. ch. 12.
[o] 1 Roll. Abr. 927.
[p] *l.* 2. *c.* 26.
[q] *l.* 2. *c.* 56. § 10.
[r] 10 Mod. 496. See vol. III. p. 18.
[s] 5 Rep. 30.
[t] Plowd. 184. Salk. 299.
[u] Salk. 303. 1 Roll. Abr. 921.

---

in the office of overseer of the poor, shall pay over all sums of money which he received by virtue of his said office, before any of his other debts are satisfied.

(12) A debt due upon a decree in equity ranks, in this respect, with one due on a judgment at law. *Mason* v. *Williams*, 2 Salk. 507. 2 Fonblanque 412. n. t.

(13) The rule of law is correctly laid down upon the principle that a debt is merely a *right to recover something by way of action*; and as the executor cannot sue himself, it must be taken that the testator meant to release the debt, when he appointed, as executor, a person who could not sue

he has nothing left for the rest; for, without a suit commenced, the executor has no legal notice of the debt [w]. (14)

[w] Dyer. 32. 2 Leon. 60.

---

sue for it. Upon the same principle, if a debtor should be appointed administrator, the legal remedy would be suspended during his life-time; but no longer, because when the technical difficulty ceases, there does not remain the same presumption of intention to release the debt for ever; and therefore upon his death an administrator *de bonis non* may sue his representative. *Lockier* v. *Smith*, 1 Sid. 79. Nor is this principle inconsistent with the latter part of the rule, that the testator's creditors are not to be disappointed of their just debts by this voluntary release; the right of action is indeed gone, but the law will presume that the executor in his individual capacity has paid the debt to himself in his representative, and will consider the amount assets in his hands for which he will be personally liable to the action of any creditor, because the non-production of the sum to answer the demand will upon that presumption be proof of a wasting of the testator's estate. 1 Salk. 303.

The doctrine of the courts of equity upon this subject is in effect very different; but commencing upon principles very analogous, they seem gradually to have departed more and more widely from the practice of the courts of law. At one time, looking to the intention of the testator, they considered the appointment as turning the debt into a legacy or specific bequest; and as such, they in general sustained it against the other legatees, because any specific bequest given to any other person would have been so sustained. But as no legacies, not even specific, could stand against the demands of creditors, so this presumed legacy in the hands of the executor became a trust, and he was held answerable for it to them, if the other assets were not sufficient.

Upon the same ground of intention, if it appeared upon the will that the testator did not intend to discharge his executor, as if he should have left a legacy, and directed it to be paid out of the sum due from the executor, in any such case the executor became as to all the legatees, general and specific, a trustee to the amount of his debt, and was not discharged. *Flood* v. *Ramcey*, Yelv. 160. *Carey* v. *Goodinge*, 3 Bro. Ch. Rep. 110.

Now, however, the general rule is, that the executor is to be considered as a trustee for the legatees; or if they have been satisfied by other assets, for the persons entitled to the residue of the testator's personal estate under the will. See *Berry* v. *Usher*, 11 Ves. 90., and the cases collected in the note there. *Simmons* v. *Gutteridge*, 13 Ves. 262.

(14) The rules laid down in the text, as to the order of payment, apply only to what are called *legal* assets; that is, such things as the executor takes as executor, and as are subject to the testator's debts *generally* by rule of law, and independently of any direction to that effect in his will. But there are also *equitable* assets, which are such things as the testator has made subject to his debts *generally*, but which, without his act, would either not have been subject to any of his debts, or only to debts of a special

6. When the debts are all discharged, the *legacies* claim the next regard; which are to be paid by the executor so far as his assets will extend; but he may not give himself the preference herein, as in the case of debts [x].

A legacy is a bequest, or gift, of goods and chattels by testament; and the person to whom it was given is stiled the legatee: which every person is capable of being, unless particularly disabled by the common law or statutes, as traitors, papists, and some others. This bequest transfers an inchoate property to the legatee; but the legacy is not perfect without the assent of the executor; for if I have a *general* or *pecuniary* legacy of 100*l.* or a *specific* one of a piece of plate, I cannot in either case take it without the consent of the executor [y] (15). For in him all the chattels are vested; and it is his business first of all to see whether there is a sufficient fund left to pay the debts of the testator: the rule of equity being, that a man must be just, before he is permitted to be generous; or, as Bracton expresses the sense of our antient law [z], "*de bonis* "*defuncti primo deducenda sunt ea quæ sunt necessitatis et* "*postea quæ sunt utilitatis, et ultimo quæ sunt voluntatis.*" And in case of a deficiency of assets, all the *general* legacies must
[513] abate proportionably, in order to pay the debts; but a *specific* legacy (of a piece of plate, a horse, or the like) is not to abate at all, or allow any thing by way of abatement, unless there be not sufficient without it [a]. Upon the same principle, if the legatees have been paid their legacies, they are afterwards bound to refund a rateable part, in case debts come in, more than sufficient to exhaust the *residuum* after the legacies paid [b]. And this law is as old as Bracton and Fleta, who tell us [c],

[x] 2 Vern. 434. 2 P. Wms. 25.
[y] Co. Litt. 111. Aleyn. 39.
[z] *l.* 2. *c.* 26. § 11.
[a] 2 Vern. 111.
[b] *Ibid.* 205.
[c] Bract. *l.* 2. *c.* 26. Flet. *l.* 2. *c* 57.

---

cial nature. These the executor takes not as executor, but as trustee; and they are to be distributed, not according to the rule of law, but of equity; that is, equally among all the creditors. What are legal, and what equitable assets, is often a disputed question; but the principle of distribution of the latter, being consonant to natural justice, the leaning of the courts has long been to extend their range. See 2 Fonblanque 397.

(15) See Vol. III. p. 98. n 8.

" *si plura sint debita, vel plus legatum fuerit, ad quæ catalla* " *defuncti non sufficiant, fiat ubique defalcatio, excepto regis* " *privilegio.*"

If the legatee dies before the testator, the legacy is a lost or *lapsed* legacy, and shall sink into the *residuum*. And if a *contingent* legacy be left to any one; as *when* he attains, or *if* he attains, the age of twenty-one; and he dies before that time: it is a lapsed legacy [d]. But a legacy to one, *to be paid* when he attains the age of twenty-one years, is a *vested* legacy, an interest which commences *in præsenti*, although it be *solvendum in futuro*; and if the legatee dies before that age, his representatives shall receive it out of the testator's personal estate, at the same time that it would have become payable in case the legatee had lived. (16) This distinction is borrowed from the civil law [e]; and its adoption in our courts is not so much owing to it's intrinsic equity, as to it's having been before adopted by the ecclesiastical courts. For, since the chancery has a concurrent jurisdiction with them, in regard to the recovery of legacies, it was reasonable that there should be a conformity in their determinations; and that the subject should have the same measure of justice in whatever court he sued [f]. But if such legacies be charged upon a real estate, in both cases they shall lapse for the benefit of the heir [g]; for,

[d] Dyer. 59. n, 15. 1 Equ. Cas.abr. 295.
[e] *Ff.* 35.I. 1 & 2.
[f] 1 Eq. Cas. Abr. 295.
[g] 2 P. Wms. 612. n. 1.

(16) The principle of this rule is the intention of the testator, collected from the words he uses; and therefore the rule must be subject to such variations as arise from that principle. A direction to pay interest is one of the circumstances from which it may be inferred that the testator meant the legacy to vest immediately; and therefore a legacy to A at twenty-one, with interest in the mean time, is a vested legacy, and will pass to the representatives of A if he dies before twenty-one. 2 P. Wms. 612. n. 1.

In extension of the same principle, where a legacy vested in A, and payable at twenty-one is directed to bear interest, his representatives are entitled to it *immediately* on his death, and do not wait till the period when he would have attained the age of twenty-one. Because they do not labour under the same incapacity which it is presumed was the ground on which the testator postponed A's enjoyment of it. *Fonnereau* v. *Fonnereau*, 1 Ves. 118.

with regard to devises affecting lands, the ecclesiastical court hath no concurrent jurisdiction. And in case of a vested legacy, due immediately, and charged on land or money in
[514] the funds, which yield an immediate profit, interest shall be payable thereon from the testator's death (17): but if charged only on the personal estate, which cannot be immediately got in, it shall carry interest only from the end of the year after the death of the testator [h].

Besides these formal legacies, contained in a man's will and testament, there is also permitted another death-bed disposition of property; which is called a donation *causâ mortis*. And that is, when a person in his last sickness, apprehending his dissolution near, delivers, or causes to be delivered to another, the possession of any personal goods (under which have been included bonds, and bills drawn by the deceased upon his banker), to keep in case of his decease. This gift, if the donor dies, needs not the assent of his executor: yet it shall not prevail against creditors; and is accompanied with this implied trust, that if the donor lives, the property thereof shall revert to himself, being only given in contemplation of death, or *mortis causa* [i]. This method of donation might have subsisted in a state of nature, being always accompanied with delivery of actual possession [k]; and so far differs from a testamentary disposition; but seems to have been handed to us from the civil lawyers [l], who themselves borrowed it from the Greeks [m]. (18)

[h] 2 P. Wms. 26, 27.

[i] Prec. Chanc. 269. 1 P. Wms. 406. 441. 3 P. Wms. 357.

[k] Law. of forfeit. 16.

[l] *Inst.* 2. 7. 1. *Ff.* l. 39. t. 6.

[m] There is a very complete *donatio mortis causa*, in the Odyssey, b. 17. v. 78. made by Telemachus to his friend Piraeus; and another by Hercules, in the Alcestes of Euripides, v. 1020.

(17) This rule, though acknowledged as to legacies charged on land, is denied as to money in the funds, &c., in *Pearson* v. *Pearson*, 1 Sch. & Lef. 11. and several other cases. See 7 Ves. 97; & 8 Ves. 412.

(18) The law of donations *mortis causa* was a good deal considered in the case of *Bunn* v. *Markham*, 7 Taunt. 224.; and it was determined that two indispensable requisites to make them valid were a delivery by the donor, and a possession in the donee continuing uninterruptedly till the donor's death. If the donor retains or recovers possession, no declaration of his intentions, that the donee shall have the thing after his death, will make the donation valid.

7. When all the debts and particular legacies are discharged, the surplus or *residuum* must be paid to the residuary legatee, if any be appointed by the will; and if there be none, it was long a settled notion that it devolved to the executor's own use by virtue of his executorship [n]. But whatever ground there might have been formerly for this opinion, it seems now to be understood [o] with this restriction; that although where the executor has no legacy at all, the *residuum* shall in general be his own; yet wherever there is sufficient on the face of a will, (by means of a competent legacy or otherwise,) to imply that the testator intended his executor should *not* have the residue, the undivided surplus of the estate shall go to the next of kin, the executor then standing upon exactly the same footing as an administrator: concerning whom indeed there formerly was much debate [p], whether or no he could be compelled to make any distribution of the intestate's estate. For, though (after the administration was taken in effect from the ordinary, and transferred to the relations of the deceased) the spiritual court endeavoured to compel a distribution, and took bonds of the administrator for that purpose, they were prohibited by the temporal courts, and the bonds declared void at law [q]. And the right of the husband not only to administer, but also to enjoy exclusively the effects of his deceased wife, depends still on this doctrine of the common law: the statute of frauds declaring only, that the statute of distributions does not extend to this case. But now these controversies are quite at an end; for by the statute 22 & 23 Car. II. c. 10. explained by 29 Car. II. c. 3. it is enacted, that the surplusage of intestate's estates, (except of femes covert, which are left as at common law [r],) shall, after the expiration of one full year from the death of the intestate, be distributed in the following manner. One third shall go to the widow of the intestate, and the residue in equal proportions to his children, or if dead, to their representatives; that is, their lineal descendants: if there are no children or legal representatives [515]

[n] Perkins, 525.

[o] Prec. Chanc. 323. 1 P. Wms. 7. 544. 2 P. Wms. 338. 3 P. Wms. 43. 194. Stra. 569. Lawson v. Lawson, *Dom. Proc.* 28 Apr. 1777.

[p] Godolph. p. 2. c. 32.

[q] 1 Lev. 233. Cart. 125. 2 P. Wms. 447.

[r] Stat. 29 Car. II. c. 3. § 25.

subsisting, then a moiety shall go to the widow, and a moiety to the next of kindred in equal degree and their representatives: if no widow, the whole shall go to the children: if neither widow nor children, the whole shall be distributed among the next of kin in equal degree and their representatives: but no representatives are admitted, among collaterals, farther than the children of the intestate's brothers and sisters [s]. The next of kindred, here referred to, are to be investigated by the same rules of consanguinity, as those who are entitled to letters of administration; of whom we have
[516] sufficiently spoken [t]. And therefore by this statute the mother, as well as the father, succeeded to all the personal effects of their children, who died intestate and without wife or issue: in exclusion of the other sons and daughters, the brothers and sister of the deceased. And so the law still remains with respect to the father; but by statute 1 Jac. II. c. 17. if the father be dead, and any of the children die intestate without wife or issue, in the life-time of the mother, she and each of the remaining children, or their representatives, shall divide his effects in equal portions.

It is obvious to observe, how near a resemblance this statute of distributions bears to our ancient English law, *de rationabili parte bonorum*, spoken of at the beginning of this chapter [u]; and which sir Edward Coke [w] himself, though he doubted the generality of it's restraint on the power of devising by will, held to be universally binding (in point of conscience at least) upon the administrator or executor, in the case of either a total or partial intestacy. It also bears some resemblance to the Roman law of succession *ab intestato* [x]: which, and because the act was also penned by an eminent civilian [y], has occasioned a notion that the parliament of England copied it from the Roman

[s] Raym. 496. Lord Raym. 571.

[t] Pag. 504.

[u] Pag. 492.

[w] 2 Inst. 33. See 1 P. Wms. 8.

[x] The general rule of such successions was this: 1. The children or lineal descendants in equal portions. 2. On failure of these, the parents or lineal ascendants, and with them the brethren or sisters of the whole blood, or, if the parents were dead, all the brethren and sisters, together with the representatives of a brother or sister deceased. 3. The next collateral relations in equal degree. 4. The husband or wife of the deceased. *Ff.* 38. 15. 1. *Nov.* 118. c. 1, 2, 3. 127. c. 1.

[y] Sir Walter Walker. Lord Raym. 574.

praetor: though indeed it is little more than a restoration, with some refinements and regulations, of our old constitutional law; which prevailed as an established right and custom from the time of king Canute downwards, many centuries before Justinian's laws were known or heard of in the western parts of Europe. So likewise there is another part of the statute of distributions, where directions are given that no child of the intestate (except his heir at law) on whom he settled in his life-time any estate in lands, or pecuniary portion, equal to the distributive shares of the other children, shall have any part of the surplusage with their brothers and sisters; but if the estates so given them, by way of advancement, are not quite equivalent to the other shares, the children so advanced shall now have so much as will make them equal. This just and equitable provision has been also said to be derived from the *collatio bonorum* of the imperial law[z]; which it certainly resembles in some points, though it differs widely in others. But it may not be amiss to observe, that with regard to goods and chattels, this is part of the antient custom of London, of the province of York, and of our sister kingdom of Scotland: and, with regard to lands descending in coparcenary, that it hath always been, and still is, the common law of England, under the name of *hotchpot*[a]. [517]

Before I quit this subject, I must however acknowledge, that the doctrine and limits of representation, laid down in the statute of distribution, seem to have been principally borrowed from the civil law: whereby it will sometimes happen, that personal estates are divided *per capita*, and sometimes *per stirpes*; whereas the common law knows no other rule of succession but that *per stirpes* only[b]. They are divided *per capita*, to every man an equal share, when all the claimants claim in their own rights, as in equal degree of kindred, and not *jure representationis*, in the right of another person. As if the next of kin be the intestate's three brothers, A, B, and C; here his effects are divided into three equal portions, and distributed *per capita*, one to

[z] *Ff.* 37. 6. 1.
[a] See ch. 12. pag. 191.
[b] See ch. 14. pag. 217.

each: but if one of these brothers, A, had been dead, leaving three children, and another B, leaving two; then the distribution must have been *per stirpes; viz.* one third to A's three children, another third to B's two children; and the remaining third to C, the surviving brother: yet if C had also been dead, without issue, then A's and B's five children, being all in equal degree to the intestate, would take in their own rights *per capita; viz.* each of them one fifth part [c].

[518] The statute of distributions expressly excepts and reserves the custom of the city of London, of the province of York, and of all other places having peculiar customs of distributing intestates' effects. So that, though in those places the restraint of devising is removed by the statutes formerly mentioned [d], their antient customs remain in full force, with respect to the estates of intestates. I shall therefore conclude this chapter, and with it, the present book, with a few remarks on those customs.

In the first place, we may observe that in the city of London [e], and province of York [f], as well as in the kingdom of Scotland [g], and probably also in Wales, (concerning which there is little to be gathered, but from the statute 7 & 8 W. III. c. 38.) the effects of the intestate, after payment of his debts, are in general divided according to the antient universal doctrine of the *pars rationabilis*. If the deceased leaves a widow and children, his substance (deducting for the widow her apparel and the furniture of her bed-chamber, which in London is called the *widow's chamber*) is divided into three parts; one of which belongs to the widow, another to the children, and the third to the administrator: if only a widow, or only children, they shall respectively, in either case, take one moiety, and the administrator the other [h]; if neither widow nor child, the administrator shall have the whole [i]. And this portion, or *dead man's* part, the administrator was wont to apply to his own use [k], till

[c] Prec. Chanc. 54.
[d] Pag. 493.
[e] Lord Raym. 1329.
[f] 2 Burn. Eccl. Law. 746.
[g] *Ibid.* 782.
[h] 1 P. Wms. 341. Salk. 426.
[i] 2 Show. 175.
[k] 2 Freem. 85. 1 Vern. 133.

the statute 1 Jac. II. c. 17. declared that the same should be subject to the statute of distribution. So that if a man dies worth 1800*l*. personal estate, leaving a widow and two children, this estate shall be divided into eighteen parts; whereof the widow shall have eight, six by the custom and two by the statute; and each of the children five, three by the custom and two by the statute: if he leaves a widow and one child, she shall still have eight parts as before; and the child shall have ten, six by the custom and four by [519] the statute: if he leaves a widow and no child, the widow shall have three-fourths of the whole, two by the custom and one by the statute; and the remaining fourth shall go by the statute to the next of kin. It is also to be observed, that if the wife be provided for by a jointure before marriage, in bar of her customary part, it puts her in a state of non-entity, with regard to the custom only[l]; but she shall be entitled to her share of the dead man's part under the statute of distributions, unless barred by special agreement[m]. And if any of the children are advanced by the father in his life-time with any sum of money (not amounting to their full proportionable part), they shall bring that portion into hotchpot with the rest of the brothers and sisters, but not with the widow, before they are entitled to any benefit under the custom[n]; but, if they are fully advanced, the custom entitles them to no further dividend[o].

Thus far in the main the customs of London and of York agree; but, besides certain other less material variations, there are two principal points in which they considerably differ. One is, that in London the share of the children (or orphanage part) is not fully vested in them till the age of twenty-one, before which they cannot dispose of it by testament[p]; and, if they die under that age, whether sole or married, their share shall survive to the other children; but after the age of twenty-one, it is free from any orphanage custom, and in case of intestacy, shall fall under

[l] 2 Vern. 665. 3 P. Wms. 16.
[m] 1 Vern. 15. 2 Chanc. Rep. 252.
[n] 2 Freem. 279. 1 Equ. Cas. Abr. 155. 2 P. Wms. 526.
[o] 2 P. Wms. 527.
[p] 2 Vern. 558.

the statute of distributions [q]. The other, that in the province of York, the heir at common law, who inherits any land either in fee or in tail, is excluded from any filial portion or reasonable part [r]. But, notwithstanding these provincial variations, the customs appear to be substantially one and the same. And as a similar policy formerly prevailed in every part of the island, we may fairly conclude the whole to be of British original; or, if derived from
[520] the Roman law of successions, to have been drawn from that fountain much earlier than the time of Justinian, from whose constitutions in many points (particularly in the advantages given to the widow) it very considerably differs; though it is not improbable that the resemblances which yet remain may be owing to the Roman usages; introduced in the time of Claudius Cæsar, who established a colony in Britain to instruct the natives in legal knowledge [s]; inculcated and diffused by Papinian, who presided at York as *praefectus praetorio* under the emperors Severus and Caracalla [t]; and continued by his successors till the final departure of the Romans in the beginning of the fifth century after Christ. (19)

[q] Prec. Chanc. 537.
[r] 2 Burn. 754.
[s] Tacit. *Annal. l.* 12. *c.* 32.
[t] Selden. *in Fletam, cap.* 4. § 3.

(19) The reader will not forget what is stated at p. 493., that these customs are now subject to the effect of the statutes there mentioned; nor that they apply only to the residue of the effects after payment of the funeral expences and debts. 1 Ld. Raym. 1329. 4 Burn. Eccl. Law, 452.

THE END OF THE SECOND BOOK.

APPENDIX.

N° I.

Vetus Carta FEOFFAMENTI.

SCIANT presentes et futuri, quod ego Willielmus, filius Willielmi de Segenho, dedi, concessi, et hac presenti carta mea confirmavi, Johanni quondam filio Johannis de Saleford, pro quadam summa pecunie quam michi dedit pre manibus, unam acram terre mee arabilis, jacentem in campo de Saleford, juxta terram quondam Richardi de la Mere: Habendam et Tenendam totam predictam acram terre, cum omnibus ejus pertinentiis, prefato Johanni, et heredibus suis, et suis assignatis, de capitalibus dominis feodi: Reddendo et faciendo annuatim eisdem dominis capitalibus servitia inde debita et consueta; Et ego predictus Willielmus, et heredes mei, et mei assignati, totam predictam acram terre, cum omnibus suis pertinentiis, predicto Johanni de Saleford, et heredibus suis, et suis assignatis, contra omnes gentes warrantizabimus in perpetuum. In cujus rei testimonium huic presenti carte sigillum meum apposui; His testibus, Nigello de Saleford, Johanne de Seybroke, Radulpho clerico de Saleford, Johanne molendario de eadem villa, & aliis. Data apud Saleford die Veneris proximo ante festum sancte Margarete virginis, anno regni regis EDWARDI filii regis EDWARDI sexto.

(L. S.)

Premises.

Habendum, and *Tenendum*.

Reddendum.

Warranty.

Conclusion.

Memorandum, quod die et anno infrascriptis plena et pacifica seisina acre infraspecificate, cum pertinentiis, data et deliberata fuit per infranominatum Willielmum de Segenho infranominato Johanni de Saleford, in propriis personis suis, secundum tenorem et effectum carte infrascripte, in presentia Nigelli de Saleford, Johannis de Seybroke, et aliorum.

Livery of seisin endorsed.

N° II.

N° II. *A modern Conveyance by* LEASE *and* RELEASE.

§ 1. LEASE, *or* BARGAIN *and* SALE, *for a year.*

Premises. THIS Indenture, made the third day of September, in the twenty-first year of the reign of our sovereign lord GEORGE the second by the grace of God king of Great Britain, France and Ireland, defender of the faith, and so forth, and in the year of our Lord one thousand seven hundred and forty-seven, be-

Parties. tween Abraham Barker of Dale Hall in the county of Norfolk, esquire, and Cecilia his wife, of the one part, and David Edwards of Lincoln's Inn in the county of Middlesex, esquire, and Francis Golding, of the city of Norwich, clerk, of the other part, witnesseth; that the said Abraham Barker and Cecilia his wife, in

Consideration. consideration of five shillings of lawful money of Great Britain to them in hand paid by the said David Edwards and Francis Golding at or before the ensealing and delivery of these presents, (the receipt whereof is hereby acknowledged,) and for other good causes and considerations them the said Abraham Barker and

Bargain and sale. Cecilia his wife hereunto specially moving, have bargained and sold, and by these presents do, and each of them doth, bargain and sell, unto the said David Edwards and Francis Golding, their

Parcels. executors, administrators, and assigns, All that the capital messuage, called Dale Hall in the parish of Dale in the said county of Norfolk, wherein the said Abraham Barker and Cecilia his wife now dwell, and all those their lands in the said parish of Dale called or known by the name of Wilson's farm, containing by estimation five hundred and forty acres, be the same more or less, together with all the singular houses, dove-houses, barns, buildings, stables, yards, gardens, orchards, lands, tenements, meadows, pastures, feedings, commons, woods, underwoods, ways, waters, watercourses, fishings, privileges, profits, easements, commodities, advantages, emoluments, hereditaments, and appurtenances whatsoever to the said capital messuage and farm belonging or appertaining, or with the same used or enjoyed, or accepted, reputed, taken, or known, as part, parcel, or member thereof, or as belonging to the same or any part thereof; and the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits thereof, and of every part and parcel thereof: To

Habendum. have and to hold the said capital messuage, lands, tenements, hereditaments, and all and singular other the premises hereinbefore mentioned, or intended to be bargained and sold, and every part

and parcel thereof, with their and every of their rights, members, and appurtenances unto the said David Edwards and Francis Golding, their executors, administrators, and assigns, from the day next before the day of the date of these presents, for and during, and until the full end and term of, one whole year from thence next ensuing and fully to be completed and ended: Yielding and paying therefore unto the said Abraham Barker and Cecilia his wife and their heirs and assigns, the yearly rent of one peppercorn at the expiration of the said time, if the same shall be lawfully demanded: To the intent and purpose that, by virtue of these presents, and of the statute for transferring uses into possession, the said David Edwards and Francis Golding may be in the actual possession of the premises, and be thereby enabled to take and accept a grant and release of the freehold, reversion, and inheritance of the same premises, and of every part and parcel thereof, to them, their heirs and assigns; to the uses, and upon the trusts, thereof to be declared by another indenture, intended to bear date the next day after the day of the date hereof. In witness whereof the parties to these presents their hands and seals have subscribed and set, the day and year first above written.

N° II.

Reddendum.

Intent.

Conclusion.

Sealed and delivered, being first duly stamped, in the presence of
George Carter.
William Browne.

Abraham Barker. (L. S.)
Cecilia Barker. (L. S.)
David Edwards. (L. S.)
Francis Golding. (L. S.)

§ 2. *Deed of* Release.

This Indenture of five parts, made the fourth day of September in the twenty-first year of the reign of our sovereign lord George the second by the grace of God King of Great Britain, France, and Ireland, defender of the faith, and so forth, and in the year of our Lord one thousand seven hundred and forty-seven, between Abraham Barker of Dale Hall in the county of Norfolk, esquire, and Cecilia his wife of the first part; David Edwards of Lincoln's Inn in the county of Middlesex, esquire, executor of the last will and testament of Lewis Edwards of Cowbridge in the county of Glamorgan, gentleman, his late father, deceased, and Francis Golding of the city of Norwich, clerk, of the second part; Charles Browne of Enstone, in the county of Oxford,

Premises.

Parties.

No II.

gentleman, and Richard More of the city of Bristol, merchant of the third part; John Barker, Esquire, son and heir apparent of the said Abraham Barker, of the fourth part; and Katherine Edwards, spinster, one of the sisters of the said David Edwards, of the fifth part. Whereas a marriage is intended, by the permission of God, to be shortly had and solemnized between the said John Barker and Katherine Edwards: Now this Indenture witnesseth, that in consideration of the said intended marriage, and of the sum of five thousand pounds, of good and lawful money of Great Britain, to the said Abraham Barker, (by and with the consent and agreement of the said John Barker and Katherine Edwards, testified by their being parties to, and their sealing and delivery of, these presents,) by the said David Edwards in hand paid at or before the ensealing and delivery hereof, being the marriage portion of the said Katherine Edwards, bequeathed to her by the last will and testament of the said Lewis Edwards, her late father, deceased; the receipt and payment whereof, the said Abraham Barker doth hereby acknowledge, and thereof, and of every part and parcel thereof, they the said Abraham Barker John Barker, and Katherine Edwards, do, and each of them doth release, acquit, and discharge the said David Edwards, his executors and administrators, for ever by these presents: and for providing a competent jointure and provision of maintenance for the said Katherine Edwards, in case she shall, after the said intended marriage had, survive and overlive the said John Barker, her intended husband: and for settling and assuring the capital messuage, lands, tenements, and hereditaments, hereinafter mentioned, and to such uses, and upon such trusts as are hereinafter expressed and declared: and for and in consideration of the sum of five shillings of lawful money of Great Britain to the said Abraham Barker and Cecilia his wife in hand paid by the said David Edwards and Francis Golding, and of ten shillings of like lawful money to them also in hand paid by the said Charles Browne and Richard Moore, at or before the ensealing and delivery hereof, (the several receipts whereof are hereby respectively acknowledged), they the said Abraham Barker and Cecilia his wife, have, and each of them hath, granted, bargained, sold, released, and confirmed, and by these presents do, and each of them doth, grant, bargain, sell, release, and confirm unto the said David Edwards and Francis Golding, their heirs and assigns, All that the capital messuage called Dale Hall, in the parish of Dale in the said county of Norfolk, wherein the said Abraham Barker and Cecilia his wife now dwell, and all those their lands in the said parish of Dale called or known by the name of Wilson's Farm, containing by estimation five hundred and forty

Recital.

Consideration.

Release.

Parcels.

acres, be the same more or less, together with all and singular houses, dovehouses, barns, buildings, stables, yards, gardens, orchards, lands, tenements, meadows, pastures, feedings, commons, woods, underwoods, ways, waters, water-courses, fishings, privileges, profits, easements, commodities, advantages, emoluments, hereditaments, and appurtenances whatsoever to the said capital messuage and farm belonging or appertaining, or with the same used, or enjoyed, or accepted, reputed, taken, or known, as part, parcel, or member thereof, or as belonging to the same or any part thereof; (all which said premises are now in the actual possession of the said David Edwards and Francis Golding, by virtue of a bargain and sale to them thereof made by the said Abraham Barker and Cecilia his wife for one whole year, in consideration of five shillings to them paid by the said David Edwards and Francis Golding, in and by one indenture bearing date the day next before the day of the date hereof, and by force of the statute for transferring uses into possession;) and the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits thereof, and every part and parcel thereof, and also all the estate, right, title interest, trust, property, claim, and demand whatsoever, both at law and in equity, of them the said Abraham Barker and Cecilia his wife, in, to, or out of the said capital messuage, lands, tenements, hereditaments, and premises: To have and to hold the said capital messuage, lands, tenements, hereditaments, and all and singular other the premises herein-before mentioned to be hereby granted and released, with their and every of their appurtenances, unto the said David Edwards and Francis Golding, their heirs and assigns to such uses, upon such trusts, and to and for such intents and purposes as are hereinafter mentioned, expressed, and declared, of and concerning the same: that is to say, to the use and behoof of the said Abraham Barker and Cecilia his wife, according to their several and respective estates and interests therein, at the time of, or immediately before, the execution of these presents, until the solemnization of the said intended marriage: and from and after the solemnization thereof, to the use and behoof of the said John Barker, for and during the term of his natural life; without impeachment of or for any manner of waste: and from and after the determination of that estate, then to the use of the said David Edwards and Francis Golding, and their heirs, during the life of the said John Barker, upon trust to support and preserve the contingent uses and estates hereinafter limited from being defeated and destroyed, and for that purpose to make entries, or bring actions, as the case shall require; but neverthe-

Mention of bargain and sale.

Habendum.

To the use of the grantors till marriage:

Then of the husband for life, *sans waste*.

Remainder to trustees to preserve contingent remainders;

N° II.

less to permit and suffer the said John Barker and his assigns, during his life to receive and take the rents and profits thereof, and of every part thereof to and for his and their own use and benefit: and from and after the decease of the said John Barker, then to the use and behoof of the said Katherine Edwards, his intended wife, for and during the term of her natural life, for her jointure, and in lieu, bar, and satisfaction of her dower and thirds at common law, which she can, or may have or claim, of, in, to, or out of, all and every, or any, of the lands, tenements, and hereditaments, whereof or wherein the said John Barker now is, or at any time or times hereafter during the coverture between them shall be, seised of any estate of freehold or inheritance: and from and after the decease of the said Katherine Edwards, or other sooner determination of the said estate, then to the use and behoof of the said Charles Browne and Richard More, their executors, administrators, and assigns, for and during, and unto the full end and term of, five hundred years from thence next ensuing and fully to be complete and ended, without impeachment of waste: upon such trusts nevertheless, and to and for such intents and purposes, and under and subject to such provisoes and agreements, as are hereinafter mentioned, expressed, and declared of and concerning the same: and from and after the end, expiration, or other sooner determination of the said term of five hundred years, and subject thereunto, to the use and behoof of the first son of the said John Barker on the body of the said Katherine Edwards his intended wife to be begotten, and of the heirs of the body of such first son lawfully issuing; and for default of such issue, then to the use and behoof of the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, and of all and every other the son and sons of the said John Barker on the body of the said Katherine Edwards his intended wife to be begotten, severally, successively, and in remainder, one after another, as they and every of them shall be in seniority of age and priority of birth, and of the several and respective heirs of the body and bodies of all and every such son and sons lawfully issuing; the elder of such sons and the heirs of his body issuing, being always to be preferred and to take before the younger of such sons, and the heirs of his or their body or bodies issuing: and for default of such issue, then to the use and behoof of all and every the daughter and daughters of the said John Barker on the body of the said Katherine Edwards his intended wife to be begotten, to be equally divided between them, (if more than one,) share and share alike, as tenants in common, and not as joint-tenants, and of the several and respective heirs of the body and bodies of all and every such

Remainder to the wife for life, for her jointure, in bar of dower:

Remainder to other trustees for a term, upon trusts after mentioned:

Remainder to the first and other sons of the marriage in tail:

Remainder to the daughters,

as tenants in common, in tail;

daughter and daughters lawfully issuing: and for default of such issue, then to the use and behoof of the heirs of the body of him the said John Barker lawfully issuing: and for default of such heirs, then to the use and behoof of the said Cecilia the wife of the said Abraham Barker, and of her heirs and assigns for ever. And as to, for, and concerning the term of five hundred years herein-before limited to the said Charles Browne and Richard More, their executors, administrators, and assigns, as aforesaid, it is hereby declared and agreed, by and between all the said parties to these presents, that the same is so limited to them upon the trusts, and to and for the intents and purposes, and under and subject to the provisoes and agreements hereinafter mentioned, expressed and declared, of and concerning the same: that is to say, in case there shall be an eldest or only son, and one or more other child or children of the said John Barker on the body of the said Katherine his intended wife to be begotten, then upon trust that they the said Charles Browne and Richard More, their executors, administrators, and assigns, by sale or mortgage of the said term of five hundred years, or by such other ways and means as they or the survivor of them, or the executors or administrators of such survivor, shall think fit, shall and do raise and levy, or borrow and take up at interest, the sum of four thousand pounds of lawful money of Great Britain, for the portion or portions of such other child or children (besides the eldest or only son) as aforesaid, to be equally divided between them (if more than one) share and share alike; the portion or portions of such of them as shall be a son or sons to be paid at his or their respective age or ages of twenty-one years; and the portion or portions of such of them as shall be a daughter or daughters to be paid at her or their respective age or ages of twenty-one years, or day or days of marriage, which shall first happen. And upon this further trust, that in the meantime and until the same portions shall become payable as aforesaid, the said Charles Browne and Richard More, their executors, administrators, and assigns, shall and do, by and out of the rents, issues, and profits of the premises aforesaid, raise and levy such competent yearly sum and sums of money for the maintenance and education of such child or children, as shall not exceed in the whole the interest of their respective portions, after the rate of four pounds in the hundred yearly. Provided always, that in case any of the same children shall happen to die before his, her, or their portions shall become payable as aforesaid, then the portion or portions of such of them so dying shall go and be paid unto and be equally divided among the survivor or survivors of them, when and at such time as the original por-

Remainder to the husband in tail; Remainder to the husband's mother in fee. The trust of the term declared;

to raise portions for younger children.

Payable at certain times,

with maintenance at the rate of 4 *per cent.*

and benefit of survivorship.

N° II.

tion or portions of such surviving child or children shall become payable as aforesaid. Provided also, that in case there shall be no such child or children of the said John Barker, on the body of the said Katherine his intended wife begotten, besides an eldest or only son; or in case all or every such child or children shall happen to die before all or any of their said portions shall become due and payable as aforesaid; or in case the said portions, and also such maintenance as aforesaid, shall by the said Charles Browne and Richard More, their executors, administrators, or assigns, be raised and levied by any of the ways and means in that behalf afore-mentioned; or in case the same by such person or persons as shall for the time being be next in reversion or remainder of the same premises expectant upon the said term of five hundred years, shall be paid or well and duly secured to be paid, according to the true intent and meaning of these presents; then and in any of the said cases, and at all times thenceforth, the said term of five hundred years, or so much thereof as shall remain unsold or undisposed of for the purposes aforesaid, shall cease, determine, and be utterly void to all intents and purposes, any thing herein contained to the contrary thereof in any wise notwithstanding. Provided also, and it is hereby further declared and agreed by and between all the said parties to these presents, that in case the said Abraham Barker or Cecilia his wife, at any time during their lives or the life of the survivor of them, with the approbation of the said David Edwards and Francis Golding, or the survivor of them, or the executors and administrators of such survivor shall settle, convey, and assure other lands and tenements of an estate of inheritance in fee-simple, in possession in some convenient place or places within the realm of England, of equal or better value than the said capital messuage, lands, tenements, hereditaments, and premises, hereby granted and released, and in lieu and recompense thereof, unto and for such and the like uses, intents, and purposes, and upon such and the like trusts, as the said capital messuage, lands, tenements, hereditaments, and premises are hereby settled and assured unto and upon, then and in such case, and at all times from thenceforth, all and every the use and uses, trust and trusts, estate and estates herein-before limited, expressed and declared of or concerning the same, shall cease, determine, and be utterly void to all intents and purposes; and the same capital messuage, lands, tenements, hereditaments, and premises, shall from thenceforth remain and be to and for the only proper use and behoof of the said Abraham Barker or Cecilia his wife, or the survivor of them, so settling, conveying, and assuring such other lands and tenements as aforesaid, and of

If no such child.

or if all die,

or if the portions be raised,

or paid,

or secured by the person next in remainder; the residue of the term to cease.

Condition, that the uses and estates hereby granted shall be void on settling other lands of equal value in recompense.

N° II.

his or her heirs and assigns for ever; and to and for no other use, intent, or purpose whatsoever; any thing herein contained to the contrary thereof in any wise notwithstanding. And, for the considerations aforesaid, and for barring all estates-tail, and all remainders or reversions thereupon expectant or depending, if any be now subsisting and unbarred or otherwise undetermined, of and in the said capital messuage, lands, tenements, hereditaments, and premises, hereby granted and released, or mentioned to be hereby granted and released, or any of them, or any part thereof, the said Abraham Barker for himself and the said Cecilia his wife, his and her heirs, executors, and administrators, and the said John Barker for himself, his heirs, executors, and administrators, do, and each of them doth, respectively covenant, promise, and grant to and with the said David Edwards and Francis Golding, their heirs, executors, and administrators, by these presents, that they the said Abraham Barker and Cecilia his wife, and John Barker, shall and will, at the costs and charges of the said Abraham Barker, before the end of Michaelmas term next ensuing the date hereof, acknowledge and levy, before his majesty's justices of the court of common pleas at Westminster, one or more fine or fines, *sur cognizance de droit, come ceo, &c.* with proclamations according to the form of the statutes in that case made and provided, and the usual course of fines in such cases accustomed, unto the said David Edwards, and his heirs, of the said capital messuage, lands, tenements, hereditaments, and premises, by such apt and convenient names, quantities, qualities, number of acres, and other descriptions to ascertain the same, as shall be thought meet; which said fine or fines, so as aforesaid, or in any other manner levied and acknowledged, or to be levied and acknowledged, shall be and enure, and shall be adjudged, deemed, construed, and taken, and so are and were meant and intended, to be and enure, and are hereby declared by all the said parties to these presents to be and enure, to the use and behoof of the said David Edwards, and his heirs and assigns; to the intent and purpose that the said David Edwards may by virtue of the said fine or fines so covenanted and agreed to be levied as aforesaid, be and become perfect tenant of the freehold of the said capital messuage, lands, tenements, hereditaments, and all other the premises, to the end that one or more good and perfect common recovery or recoveries may be thereof had and suffered, in such manner as is hereinafter for that purpose mentioned. And it is hereby declared and agreed by and between all the said parties to these presents, that it shall and may be lawful to and for the said Francis Golding, at the costs and charges of the said Abra-

Covenant to levy a fine,

in order to make a tenant to the *præcipe*, that a recovery may be suffered;

N° II.

ham Barker, before the end of Michaelmas term next ensuing the date hereof, to sue forth and prosecute out of his majesty's high court of chancery one or more writ or writs of entry *sur disseisin en la post* returnable before his majesty's justices of the court of common pleas at Westminster, thereby demanding by apt and convenient names, quantities, qualities, number of acres, and other descriptions, the said capital messuage, lands, tenements, hereditaments, and premises, against the said David Edwards; to which said writ, or writs, of entry he the said David Edwards shall appear *gratis*, either in his own proper person, or by his attorney thereto lawfully authorized, and vouch over to warranty the said Abraham Barker and Cecilia his wife, and John Barker; who shall also *gratis* appear in their proper person, or by their attorney or attorneys, thereto lawfully authorized, and enter into the warranty, and vouch over to warranty the common vouchee of the same court; who shall also appear, and after imparlance shall make default: so as judgment shall and may be thereupon had and given for the said Francis Golding to recover the said capital messuage, lands, tenements, hereditaments, and premises, against the said David Edwards, and for him to recover in value against the said Abraham Barker and Cecilia his wife, and John Barker, and for them to recover in value against the said common vouchee, and that execution shall and may be thereupon awarded, and had accordingly, and all and every other act and thing be done and executed, needful and requisite for the suffering and perfecting of such common recovery or recoveries, with vouchers as aforesaid. And it is hereby further declared and agreed by and between all the said parties to these presents, that immediately from and after the suffering and perfecting of the said recovery or recoveries, so as aforesaid, or in any other manner, or at any other time or times, suffered or to be suffered, as well these presents and the assurance hereby made, and the said fine or fines, so covenanted to be levied as aforesaid, as also the said recovery or recoveries, and also all and every other fine or fines, recovery and recoveries, conveyances, and assurances in the law whatsoever heretofore had, made, levied, suffered, or executed, or hereafter to be had, made, levied, suffered, or executed, of the said capital messuage, lands, tenements, hereditaments, and premises, or any of them, or any part thereof, by and between the said parties to these presents or any of them, or whereunto they or any of them are or shall be parties or privies, shall be and enure, and shall be adjudged, deemed, construed, and taken, and so are and were meant and intended, to be and enure, and the recoveror or recoverors in the said recovery or recoveries named

to enure

N° II.

or to be named, and his or their heirs, shall stand and be seised of the said capital messuage, lands, tenements, hereditaments, and premises, and of every part and parcel thereof, to the uses, upon the trusts, and to and for the intents and purposes, and under and subject to the provisoes, limitations, and agreements hereinbefore mentioned, expressed, and declared, of and concerning the same. And the said Abraham Barker, party hereunto, doth hereby for himself, his heirs, executors, and administrators, further covenant, promise, grant, and agree, to and with the said David Edwards and Francis Golding, their heirs, executors, and administrators, in manner and form following; that is to say, that the said capital messuage, lands, tenements, hereditaments, and premises, shall and may at all times hereafter remain, continue, and be, to and for the uses and purposes, upon the trusts, and under and subject to the provisoes, limitations, and agreements, herein-before mentioned, expressed, and declared of and concerning the same; and shall and may be peaceably and quietly had, held, and enjoyed accordingly, without any lawful let or interruption of or by the said Abraham Barker or Cecilia his wife, parties hereunto, his or her heirs or assigns, or of or by any other person or persons lawfully claiming or to claim from, by, or under, or in trust for him, her, them, or any of them; or from, by, or under, his or her ancestors, or any of them; and shall so remain, continue, and be, free and clear, and freely and clearly acquitted, exonerated, and discharged, or otherwise, by the said Abraham Barker or Cecilia his wife, parties hereunto, his or her heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless, and indemnified of, from, and against all former and other gifts, grants, bargains, sales, leases, mortgages, estates, titles, troubles, charges, and incumbrances whatsoever, had, made, done, committed, occasioned, or suffered, or to be had, made, done, committed, occasioned, or suffered, by the said Abraham Barker or Cecilia his wife, or by his or her ancestors, or any of them, or by his, her, their, or any of their act, means, assent, consent or procurement; And moreover that he the said Abraham Barker and Cecilia his wife, parties hereunto, and his or her heirs, and all other persons having or lawfully claiming, or which shall or may have or lawfully claim, any estate, right, title, trust or interest, at law or in equity, of, in, to, or out of the said capital messuage, lands, tenements, hereditaments, and premises, or any of them, or any part thereof, by or under or in trust for him, her, them, or any of them, or by or under his or her ancestors, or any of them, shall and will from time to time, and at all times hereafter, upon every reasonable request, and at the costs and charges of the said

to the preceding uses in this deed.

Other covenants;

for quiet enjoyment,

free from incumbrances.

and for further assurance.

N° II.

David Edwards and Francis Golding, or either of them, their or either of their heirs, executors, or administrators, make, do, and execute, or cause to be made, done, and executed, all such further and other lawful and reasonable acts, deeds, conveyances, and assurances in the law whatsoever, for the further, better, more perfect, and absolute granting, conveying, settling, and assuring of the same capital messuage, lands, tenements, hereditaments, and premises, to and for the uses and purposes, upon the trusts, and under and subject to the provisoes, limitations, and agreements, herein-before mentioned, expressed, and declared, of and concerning the same, as by the said David Edwards and Francis Golding, or either of them, their or either of their heirs, executors, or administrators, or their or any of their counsel learned in the law, shall be reasonably advised, devised, or required; so as such further assurances contain in them no further or other warranty or covenants than against the person or persons, his, her, or their heirs, who shall make or do the same; and so as the party or parties, who shall be requested to make such further assurances, be not compelled or compellable, for making or doing thereof, to go and travel above five miles from his, her, or their then respective dwellings, or places of abode. Provided lastly, and it is hereby further declared and agreed by and between all the parties to these presents, that it shall and may be lawful to and for the said Abraham Barker and Cecilia his wife, John Barker and Katherine his intended wife, and David Edwards, at any time or times hereafter, during their joint lives, by any writing or writings under their respective hands and seals, and attested by two or more credible witnesses, to revoke, make void, alter, or change all and every or any the use and uses, estate and estates, herein and hereby before limited and declared, or mentioned or intended to be limited and declared, of and in the capital messuage, lands, tenements, hereditaments, and premises aforesaid, or of and in any part or parcel thereof, and to declare new and other uses of the same, or of any part or parcel thereof, any thing herein contained to the contrary thereof in any wise notwithstanding. In witness whereof the parties to these presents their hands and seals have subscribed and set, the day and year first above written.

Power of revocation.

Conclusion.

Sealed, and delivered, being first duly stamped, in the presence of
George Carter.
William Browne.

Abraham Barker. (L. S.)
Cecilia Barker. (L. S.)
David Edwards. (L. S.)
Francis Golding. (L. S.)
Charles Browne. (L. S.)
Richard Moore. (L. S.)
John Barker. (L. S.)
Katherine Edwards. (L. S.)

N° III.

An OBLIGATION *or* BOND, *with* CONDITION *for the Payment of Money.*

KNOW all men by these presents, that I David Edwards of Lincoln's Inn in the county of Middlesex, esquire, am held and firmly bound to Abraham Barker of Dale Hall in the county of Norfolk, esquire, in ten thousand pounds of lawful money of Great Britain to be paid to the said Abraham Barker, or his certain attorney, executors, administrators, or assigns; for which payment well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents, sealed with my seal. Dated the fourth day of September in the twenty-first year of the reign of our sovereign lord GEORGE the second, by the grace of God king of Great Britain, France and Ireland, defender of the faith, and so forth, and in the year of our lord one thousand seven hundred and forty seven.

The condition of this obligation is such, that if the above-bounden David Edwards, his heirs, executors, or administrators, do and shall well and truly pay, or cause to be paid, unto the above-named Abraham Barker, his executors, administrators, or assigns, the full sum of five thousand pounds of lawful British money, with lawful interest for the same, on the fourth day of March next ensuing the date of the above-written obligation, then this obligation shall be void and of none effect, or else shall be and remain in full force and virtue.

Sealed, and delivered, being first duly stamped, in the presence of
George Carter.
William Browne.

David Edwards. (L. S.)

N° IV.

A FINE *of Lands* sur Cognizance de Droit, come ceo, *&c.*

Writ of Covenant; or PRAECIPE.

GEORGE the second, by the grace of God, of Great Britain, France and Ireland, king, defender of the faith, and so forth, to the sheriff of Norfolk, greeting. Command Abraham Barker, esquire, and Cecilia his wife, and John Barker, esquire, that justly and without delay they perform to David Edwards, esquire, the covenant made between them of two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale; and unless they shall so do, and if the said David shall give you security of prosecuting his claim, then summon by good summoners the said Abraham, *Cecilia, and John, that they* appear before our justices at Westminster, from the day of Saint Michael in one month, to shew wherefore they have not done it: and have you there the summoners, and this writ. Witness ourself at Westminster, the ninth day of October, in the twenty-first year of our reign.

Sheriff's return. Pledges of prosecution } John Doe. Richard Roe. Summoners of the within-named Abraham, Cecilia, and John. } John Den. Richard Fen.

§ 2. *The Licence to agree.*

Norfolk, to wit. } David Edwards, esquire, gives to the lord the king ten marks, for licence to agree with Abraham Barker, esquire, of a plea of covenant of two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances in Dale.

§ 3. *The Concord.*

And the agreement is such, to wit, that the aforesaid Abraham, Cecilia, and John have acknowledged the aforesaid tenements

with the appurtenances, to be the right of him the said David, as those which the said David hath of the gift of the aforesaid Abraham, Cecilia, and John; and those they have remised and quitted claim, from them and their heirs, to the aforesaid David and his heirs for ever. And further the same Abraham, Cecilia, and John, have granted for themselves and their heirs, that they will warrant to the aforesaid David and his heirs, the aforesaid tenements, with the appurtenances, against all men for ever. And for this recognition, remise, quit-claim, warranty, fine, and agreement, the said David hath given to the said Abraham, Cecilia, and John, two hundred pounds sterling.

§ 4. *The Note, or Abstract.*

Norfolk, to wit. } Between David Edwards, esquire, complainant, and Abraham Barker, esquire, and Cecilia his wife, and John Barker, esquire, deforciants, of two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale, whereupon a plea of covenant was summoned between them: to wit, that the said Abraham, Cecilia, and John have acknowledged the aforesaid tenements, with the appurtenances, to be the right of him the said David, as those which the said David hath of the gift of the aforesaid Abraham, Cecilia, and John; and those they have remised and quitted claim, from them and their heirs, to the aforesaid David and his heirs for ever. And further the same Abraham, Cecilia, and John, have granted for themselves and their heirs, that they will warrant to the aforesaid David and his heirs the aforesaid tenements, with the appurtenances, against all men for ever. And for this recognition, remise, quit-claim, warranty, fine, and agreement, the said David hath given to the said Abraham, Cecilia, and John, two hundred pounds sterling.

§ 5. *The Foot, Chirograph, or Indentures of the* Fine.

Norfolk, to wit. } This is the final agreement, made in the court of the lord the king at Westminster, from the day of Saint Michael in one month, in the twenty-first year of the reign of the Lord George the second, by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth, before John Willes, Thomas Abney, Thomas Burnet, and Thomas Birch, justices, and other faithful subjects of the lord

N° IV. the king then there present, between David Edwards, esquire, complainant, and Abraham Barker, esquire, and Cecilia his wife, and John Barker, esquire, deforciants, of two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale, whereupon a plea of covenant was summoned between them in the said court; to wit, that the aforesaid Abraham, Cecilia, and John, have acknowledged the aforesaid tenements, with the appurtenances, to be the right of him the said David, as those which the said David hath of the gift of the aforesaid Abraham, Cecilia, and John; and those they have remised and quitted claim, from them and their heirs, to the aforesaid David and his heirs for ever. And further, the same Abraham, Cecilia, and John, have granted for themselves and their heirs, that they will warrant to the aforesaid David and his heirs, the aforesaid tenements, with the appurtenances, against all men for ever. And for this recognition, remise, quit-claim, warranty, fine, and agreement, the said David hath given to the said Abraham, Cecilia, and John, two hundred pounds sterling.

§ 6. *Proclamations, endorsed upon the* FINE, *according to the Statutes.*

The first proclamation was made the sixteenth day of November, in the term of Saint Michael, in the twenty-first year of the king withinwritten.

The second proclamation was made the fourth day of February, n the term of Saint Hilary, in the twenty-first year of the king withinwritten.

The third proclamation was made the thirteenth day of May, n the term of Easter, in the twenty-first year of the king withinwritten.

The fourth proclamation was made the twenty-eighth day of June, in the term of the holy Trinity, in the twenty-second year of the king withinwritten.

N° IV.

N° V

A common RECOVERY *of Lands with double* Voucher.*

§ 1. *Writ of Entry* sur Disseisin *in the* Post; *or* PRAECIPE.

GEORGE the second, by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth, to the sheriff of Norfolk, greeting. Command David Edwards, esquire, that justly and without delay he render to Francis Golding, clerk, two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances in Dale, which he claims to be his right and inheritance, and into which the said David hath not entry, unless after the disseisin, which Hugh Hunt thereof unjustly, and without judgment, hath made to the aforesaid Francis, within thirty years now last past, as he saith, and whereupon he complains that the aforesaid David deforceth him. And unless he shall so do, and if the said Francis shall give you security of prosecuting his claim, then summon by good summoners the said David, that he appear before our justices at Westminster on the octave of Saint Martin, to shew wherefore he hath not done it; and have you there the summoners, and this writ. Witness ourself at Westminster the twenty-ninth day of October, in the twenty-first year of our reign.

Pledges of prosecution { John Doe. Richard Roe. } Summoners of the within named David. { John Den. Richard Fen. } Sheriff's return.

§ 2. *Exemplification of the* RECOVERY *Roll.*

GEORGE the second, by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth, to all to whom these our present letters shall come, greeting. Know ye, that among the pleas of land enrolled at Westminster, before Sir John Willes, knight, and his fellows, our justices of the bench, of the term of Saint Michael in the twenty-first year

* Note, that if the recovery be had with single voucher, the parts marked "thus" in § 2. are omitted.

N° V.

of our reign, upon the fifty-second roll it is thus contained. Entry returnable on the octave of Saint Martin. Norfolk, to wit; Francis Golding, clerk, in his proper person demandeth against David Edwards, esquire, two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture and fifty acres of wood, with the appurtenances, in Dale, as his right and inheritance, and into which the said David hath not entry, unless after the disseisin, which Hugh Hunt thereof unjustly, and without judgment, hath made to the aforesaid Francis, within thirty years now last past. And whereupon he saith, that he himself was seised of the tenements aforesaid, with the appurtenances, in his demesne as of fee and right, in time of peace, in the time of the lord the king that now is, by taking the profits thereof to the value [* of six shillings and eight pence, and more, in rents, corn, and grass:] and into which [the said David hath not entry, unless as aforesaid:] and thereupon he bringeth suit [and good proof]. And the said David in his proper person comes and defendeth his right, when [and where it shall behove him,] and thereupon voucheth to warranty "John Barker, esquire; who is present here in court "in his proper person, and the tenements aforesaid with the "appurtenances to him freely warranteth [and prays that the "said Francis may count against him]. And hereupon the said "Francis demandeth against the said John, tenant by his own "warranty, the tenements aforesaid with the appurtenances, in "form aforesaid, *&c.* And whereupon he saith, that he himself was seised of the tenements aforesaid, with the appurtenances, in his demesne as of fee and right, in time of peace, "in the time of the Lord the king that now is, by taking the "profits thereof to the value, *&c.* And into which, *&c.* And "thereupon he bringeth suit, *&c.* And the aforesaid John, "tenant by his own warranty, defends his right, when, *&c.* and "thereupon he further voucheth to warranty" Jacob Morland; who is present here in court in his proper person, and the tenements aforesaid, with the appurtenances to him freely warranteth, *&c.* And hereupon the said Francis demandeth against the said Jacob, tenant by his own warranty, the tenements aforesaid, with the appurtenances, in form aforesaid, *&c.* And whereupon he saith, that he himself was seised of the tenements aforesaid, with the appurtenances in his demesne as of fee and right, in time of peace, in the time of the lord the king that now is, by taking the profits thereof to the value, *&c.* And

Return.
Demand against the tenant.
Count.
Esples.
Defence of the tenant.
Voucher.
"Warranty.
"Demand "against "the "vouchee. "Count.
"Defence "of the "vouchee. "Second "voucher."
Warranty.
Demand against the common vouchee.
Count.

The clauses, between hooks, are no otherwise expressed in the record than by an *&c.*

into which, &c. And thereupon he bringeth suit, &c. And the aforesaid Jacob, tenant by his own warranty, defends his right, when, &c. And saith that the aforesaid Hugh did not disseise the aforesaid Francis of the tenements aforesaid, as the aforesaid Francis by his writ and count aforesaid above doth suppose: and of this he puts himself upon the country. And the aforesaid Francis thereupon craveth leave to imparl; and he hath it. And afterwards the aforesaid Francis cometh again here into court in this same term in his proper person, and the aforesaid Jacob, though solemnly called, cometh not again, but hath departed in contempt of the court, and maketh default. Therefore it is considered, that the aforesaid Francis do recover his seisin against the aforesaid David of the tenements aforesaid, with the appurtenances: and that the said David have of the land of the aforesaid "John, to the value [of the tenements aforesaid;] "and further, that the said John have of the land of the said" Jacob to the value [of the tenements aforesaid.] And the said Jacob in mercy. And hereupon the said Francis prays a writ of the lord the king, to be directed to the sheriff of the county aforesaid, to cause him to have full seisin of the tenements aforesaid with the appurtenances; and it is granted unto him, returnable here without delay. Afterwards, that is to say, the twenty-eighth day of November in this same term, here cometh the said Francis in his proper person; and the sheriff namely Sir Charles Thomson, knight, now sendeth, that he by virtue of the writ aforesaid, to him directed, on the twenty-fourth day of the same month, did cause the said Francis to have full seisin of the tenements aforesaid with the appurtenances, as he was commanded. All and singular which premises, at the request of the said Francis, by the tenor of these presents we have held good to be exemplified. In testimony whereof we have caused our seal, appointed for sealing writs in the bench aforesaid, to be affixed to these presents. Witness Sir John Willes, knight, at Westminster, the twenty-eighth day of November, in the twenty-first year of our reign.

Cooke.

N° V.

Defence of the common vouchee.

Plea, *nul disseisin.*

Imparlance.

Default of the common vouchee.

Judgment for the demandant.

Recovery in value.

Amercement.

Award of the writ of seisin, and return.

Exemplification continued.

Testa.

THE END OF THE SECOND VOLUME.